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THE
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1960

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and

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and

Peerage Cases

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1960

MEMORANDA

1960.

Jan. 6. The Right Hon. Lord Somervell of Harrow, a Lord of Appeal in Ordinary from 1954, resigned.

Jan. 6. The Right Hon. Sir John William Morris, a Lord Justice of Appeal since 1951, was created a Lord of Appeal in Ordinary with the style and title of Lord Morris of Borth-y-Gest, in the County of Caernarvonshire.

Jan. 6. The Hon. Sir Patrick Arthur Devlin, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1948, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Jan. 6. The Hon. Sir Gerald Ritchie Upjohn, a Justice of Her Majesty's High Court of Justice, Chancery Division, since 1951, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.

Jan. 6. The Right Hon. Sir Charles Robert Ritchie Romer, a Lord Justice of Appeal since 1951, resigned.

Jan. 8. The Hon. Sir Harry Bevir Vaisey, a Justice of Her Majesty's High Court of Justice, Chancery Division, since 1944, retired.

Jan. 8. The Hon. Charles Ritchie Russell, Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

Jan. 8. Harry Vincent Lloyd-Jones, Esq., Q.C., was appointed to be one of the Justices of Mer Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.

Jan. 8. Arthur Geoffrey Neale Cross, Esq., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

Jan. 8. The Hon. Denys Burton Buckley was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

Jan. 8. The Hon. Sir Henry Wynn-Parry, a Justice of Her Majesty's High Court of Justice since 1946, retired.

Jan. 8. The Hon. Sir Eric Sachs, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, since 1954, was transferred to the Queen's Bench Division.

Jan. 20. Mr. Justice Pearson was appointed to be President of the Restrictive Practices Court, and Mr. Justice Diplock and Mr. Justice Russell were nominated to be members of that court in place of Lord Justice Devlin and Lord Justice Upjohn.

Jan. 26. Sir Lionel Leach, sometime member of the Judicial Committee of the Privy Council, died, aged 76.

Apr. 13. The Hon. Sir Ronald Francis Roxburgh, a Justice of Her Majesty's High Court of Justice, Chancery Division, since 1946, retired.

Apr. 13. John Pennycuick, Esq., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Chancery Division, and a knighthood was conferred upon him.

Sept. 30. The Right Hon. Lord Cohen, a Lord of Appeal in Ordinary since 1951, resigned.

1960.

Sept. 30. THE RIGHT HON. SIR FRANCIS LORD CHARLTON HODSON, a Lord Justice of Appeal since 1951, was created a Lord of Appeal in Ordinary with the style and title of Baron Hodson of Rotherfield Greys in the County of Oxford.

Sept. 30. THE HON. SIR TERENCE NORBERT DONOVAN, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1950, was appointed to be one of the Lords Justices of Appeal, and was sworn a member of the Privy Council.

Sept. 30. THE HON. SIR HUBERT JOSEPH WALLINGTON, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, since 1944, retired.

Sept. 30. SIR DAVID ARNOLD SCOTT CAIRNS, Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division.

Sept. 30. FENTON ATKINSON, ESQ., Q.C., was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

Oct. 8. RALPH SUTTON, ESQ., Q.C., editor of The Law Reports from 1941 to 1953, died, aged 79.

Nov. 16. THE HON. SIR LAURENCE AUSTIN BYRNE, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1945, retired.

Nov. 16. JUDGE SIR BASIL NIELD was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division.

Nov. 18. THE RIGHT HON. LORD SOMERVELL OF HARROW, Lord of Appeal in Ordinary from 1954, died, aged 71.

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Chiwell *v.* Carlyon	14 S.C. 61 (Cape of Good Hope)	*C.*	659, 682
Chrimes, *In re*	[1917] 1 Ch. 30		7
Christie *v.* Lord Advocate	1935 S.C. 169; [1936] A.C. 569; [1936] 1 All E.R. 443	*R.*	421, 429
Clyde Navigation Trustees *v.* Adamson	1 M. 974; 4 Macq. H.L. 931	*Dist.*	813, 822, 825, 827, 830
Cockram *v.* Tropical Preservation Co. Ltd.	[1951] 2 K.B. 827; [1951] 2 T.L.R. 814; [1951] 2 All E.R. 520		931
Cohen and Moore *v.* Inland Revenue Commissioners	[1933] 2 K.B. 126		5
Cole *v.* Blackstone & Co. Ltd.	[1943] K.B. 615; 59 T.L.R. 374	*R.*	655
Colombo Electric Tramway Co. *v.* Attorney-General	16 N.L.R. 161		867
Colonial Sugar Refining Co. Ltd. *v.* Irving	[1905] A.C. 369; 21 T.L.R. 513	*Dist.*	966, 975, 977
Commercial Bank of Scotland *v.* Glasgow Corporation	1925 S.L.T.(Sh. Ct.) 142	*R.*	822, 826, 829
Commonwealth *v.* Alger	7 Cush. 53		503
Connecticut Fire Insurance Co. *v.* Kavanagh	[1892] A.C. 473; 8 T.L.R. 752		692
Connecticut Fire Insurance Co. *v.* Kavanagh	[1892] A.C. 473; 8 T.L.R. 752		326
Conservators of the River Tone *v.* Ash	10 B. & C. 349		868
Contract and Trading Co. (Southern) Ltd. *v.* Barbey	[1959] 2 Q.B. 157; [1959] 2 W.L.R. 568; [1959] 2 All E.R. 145	*Aff.*	246
Conway *v.* Wade	[1909] A.C. 506; 25 T.L.R. 779		914
Conway *v.* Wade	[1909] A.C. 506; 25 T.L.R. 779		138
Co-operative Permanent Building Society *v.* Pinkerton	(1958) Unreported	*R.*	822, 826, 829
Cooper *v.* Wilson	[1937] 2 Q.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726		278
Cooray *v.* The Queen	[1953] A.C. 407; [1953] 2 W.L.R. 965		588
Cork Corporation *v.* Shinkwin	Sm. & Bat. 395		70

Corke, *In re*	[1954] 1 W.L.R. 899; [1954] 2 All E.R. 440		800
Cornish Mutual Assurance Co. *v.* Inland Revenue Commissioners	[1926] A.C. 281; 12 T.C. 841		472
Cosh's Contract, *In re*	[1897] 1 Ch. 9		532
Coutts & Co. *v.* Inland Revenue Commissioners	[1953] A.C. 267; [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418		613
Cowan *v.* Seymour	[1920] 1 K.B. 500; 36 T.L.R. 155	*R.*	394
Crediton Gas Co. *v.* Crediton Urban District Council	[1928] Ch. 447; 44 T.L.R. 369		836
Crespigny *v.* Wittenoom	4 T.R. 790		532
Croft *v.* Dunphy	[1933] A.C. 156; 48 T.L.R. 652		498
Crofter Hand Woven Harris Tweed Co. Ltd. *v.* Veitch	[1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142		915
Cummings *v.* London Bullion Co. Ltd.	[1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383	*Appl.*	246, 253, 255
Cutler *v.* Wandsworth Stadium Ltd.	[1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544		195
Dadzie *v.* Kojo	6 W.A.C.A. 139	*Appl.*	733, 743
Daimler Co. Ltd. *v.* Continental Tyre and Rubber Co. (Great Britain) Ltd.	[1916] 2 A.C. 307; 32 T.L.R. 624		357
Dale *v.* Inland Revenue Commissioners	[1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671		403
Dampskibsselskabet Danmark *v.* Poulsen	1913 S.C. 1043		692
Darley *v.* The Queen	12 Cl. & F. 520		585
Dassanayake *v.* Tillekeratne	20 N.L.R. 89		597
David *v.* De Silva	[1934] A.C. 106; 50 T.L.R. 165		96
D'Avigdor-Goldsmid *v.* Inland Revenue Commissioners	[1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403	*C.*	609, 618, 622, 629–632
Davis Cohen & Sons Ltd. *v.* Hall	[1952] 1 All E.R. 157; [1952] W.N. 33	*R.*	955
Dawson (G. J.) (Clapham) Ltd. *v.* H. & G. Dutfield	[1936] 2 All E.R. 232		93
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Debtor (No. 490 of 1935), *In re* A	[1936] Ch. 237; 52 T.L.R. 70	*Dist.*	966, 975, 978
Dedhar *v.* Commissioner of Lands	[1957] E.A.C.A. 104	*Appr.*	46, 62
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De Silva *v.* Goonetileke	32 N.L.R. 217		894
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Dewhurst *v.* Hunter	145 L.T. 225; 146 L.T. 510		382
Dharmawansa Thero *v.* Ukku Banda	60 N.L.R. 350		849
Dickinson, *In re*, *Ex p.* Charrington	22 Q.B.D. 187; 5 T.L.R. 82		26
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Duncan *v.* Lawson	41 Ch.D. 394; 5 T.L.R. 402		666
Dunlop Rubber Co. Ltd.'s Application, *In re*	59 R.P.C. 134	*R.*	730
Duraisamy *v.* Commissioner for Registration of Indian and Pakistani Residents	56 N.L.R. 313		873
Dyson *v.* Attorney-General	[1911] 1 K.B. 410; 27 T.L.R. 143		874
Ealing Borough Council *v.* Minister of Housing and Local Government	[1952] Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639		280
Earl Cowley *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270; [1898] 1 Q.B. 355; 14 T.L.R. 92	*D.*	399, 410–412, 414, 416, 419, 422, 424, 426–430
East Kent Packers Ltd. *v.* Buncombe	45 R. & I.T. 151		932
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Edgelow *v.* MacElwee	[1918] 1 K.B. 205	*C.*	179, 191
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Edwards *v.* "Old Brushmills" Distillery Co. Ltd.	10 T.C. 285		557
Egyptian Delta Land and Investment Co. Ltd. *v.* Todd	[1929] A.C. 1; 44 T.L.R. 747	*C.*	352, 361, 367, 368
Eichholz, *In re*	[1959] Ch. 708; [1959] 2 W.L.R. 200; [1959] 1 All E.R. 166		7
Electrix Ltd. *v.* Electrolux Ltd.	[1958] R.P.C. 176; [1957] R.P.C. 369	*Aff.*	723
Ellis and Ruislip-Northwood Urban District Council, *In re* an Arbitration between	[1920] 1 K.B. 343; 35 T.L.R. 673		505
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Francis *v.* Yiewsley and West Drayton Urban District Council	[1957] 2 Q.B. 136; [1957] 2 W.L.R. 627; [1957] 1 All E.R. 825; [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529	*Appl.*	263, 286, 305
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Fullers Ltd. *v.* Squire	[1901] 2 K.B. 209	*R.*	951
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Gough's Garages Ltd. *v.* Pugsley	[1930] 1 K.B. 615; 46 T.L.R. 283		507
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Graham & Scott (Southgate) Ltd. *v.* Oxlade	[1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856		695
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Grey *v.* Pearson	6 H.L.C. 61		613
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Wilson *v.* Northampton and Banbury Junction Railway Co.	L.R. 9 Ch. 279		324
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1869

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1890

Foreign Jurisdiction Act, 1890 (53 & 54 *Vict. c.* 37), *ss.* 4, 5, *Sch. I* - - **J.C. 786**

1891

Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 54 **H.L.(E.) 206**

1894

Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*), (2), (3) - **H.L.(E.) 398**

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1900

Moneylenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 6 (*d*) - - - - **J.C. 178**

1901

Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149 - - **H.L.(E.) 926**

1906

Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 5 - - - - - **J.C. 132**

1910

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1913

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1918

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1919

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1920

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1921

Ministries of Northern Ireland Act (Northern Ireland), 1921 (12 *Geo.* 5, *c.* 6), *s.* 3 (1) - - - **H.L.(N.I.) 490**

1924

Malvern Hills Act, 1924 (14 & 15 *Geo.* 5, *c.* xxxvi), *s.* 54, *Sch.* 4 **H.L.(E.) 260**

1925

Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*) **H.L.(E.) 1, 206**

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 51 (1) - - - **H.L.(E.) 965**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 & 19 *Geo.* 5, *c.* 44), *s.* 3 (1) **H.L.(E.) 926**

1931

NORTHERN IRELAND

Planning and Housing Act (Northern Ireland), 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 10 (2) **H.L.(N.I.) 490**

1934

Finance Act, 1934 (24 & 25 *Geo.* 5, *c.* 32), *s.* 28 - - - - **H.L.(Sc.) 608**

1937

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1938

Trade Marks Act, 1938 (1 & 2 *Geo.* 6, *c.* 22), *ss.* 9, 10, 12 (2) - - **H.L.(E.) 722**

1939

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Trade Unions Act, 1939 (*Leeward Islands, No.* 16 *of* 1939), *s.* 2 - - - **J.C. 907**

1942

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1944

NORTHERN IRELAND

Planning (Interim Development) Act (Northern Ireland), 1944 (7 & 8 *Geo.* 6, *c.* 3), *s.* 6 (4) - - **H.L.(N.I.) 490**

1947

Exchange Control Act, 1947 (10 *&* 11 *Geo*. 6, *c*. 14), *ss*. 5, 33 (1), *proviso*, *Sch. IV*, *para*. 4 - - - **H.L.(E.) 244**

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Town and Country Planning Act, 1947 (10 *&* 11 *Geo*. 6, *c*. 51), *ss*. 14, 15, 17, 26, 27 **H.L.(E.) 260**

1948

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1949

Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo*. 6, *c*. 40), *ss*. 2, 18 - - - **H.L.(E.) 528**

1950

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—— ——, *s*. 5 (1) - - - - **J.C. 890**

1952

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1953

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1954

Mines and Quarries Act, 1954 (2 *&* 3 *Eliz*. 2, *c*. 70), *s*. 81 (1) - **H.L.(Sc.) 633**

1956

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Service Tenures Ordinance, No. 4 *of* 1870, *s*. 25 **J.C. 890**

KENYA

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Registration of Titles Ordinance, 1919 (*Laws of Kenya*, 1948 *Rev*., *c*. 160), *ss*. 20, 21; *Sch. I*, *form B* (1) - **J.C. 44**

CEYLON

Buddhist Temporalities Ordinance (*c*. 222, *Legislative Enactments of Ceylon*, 1938 *Rev*.), *s*. 20 - - - **J.C. 842**

CEYLON

Civil Procedure Code (*Legislative Enactments of Ceylon*, 1938 *Rev*., *c*. 86), *s*. 238 **J.C. 571**

Land Redemption Ordinance, No. 61 *of* 1942, *s*. 3 (1) (*b*) - - - **J.C. 890**

—— —— (*as amended by Ordinance No*. 62 *of* 1947), *s*. 3 (1) (*b*) (*c*) - **J.C. 854; 884**

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MALAYA

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Motor Vehicles Commercial Use (*Amendment*) *Regulations* (*Malaya*), 1948, *reg.* 3 **J.C. 167**

AUSTRALIA

Double Taxation Relief (*Taxes on Income*) (*Australia*) *Order*, 1947 (*S.R. & O.*, 1947, *No.* 806), *Sch.*, *art. II* (1) (*i*), (3); *art. III* (2), (3) - **H.L.(E.) 459**

UGANDA

Rent Restriction Ordinance, *No.* 10 *of* 1949 (*Laws of Uganda*, 1951, *c.* 115), *s.* 3 (2) - - - - **J.C. 192**

TRINIDAD AND TOBAGO

Trade Disputes (*Arbitration and Inquiry*) *Ordinance*, *Laws of Trinidad and Tobago*, 1950 *Rev.* (*c.* 22, *No.* 10), *ss.* 2 (1), 8 (1) - - - **J.C. 132**

Trinidad and Tobago (*Constitution*) *Order in Council*, 1950 (*as amended by the Trinidad and Tobago* (*Constitution*) (*Amendment*) *Order in Council*, 1956), *ss.* 38 (3) (*e*), 40 (1) - - **J.C. 579**

Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I*, *Class XII* **H.L.(E.) 260**

BAHRAIN

Bahrain Order, 1952, *arts.* 8, 67, 68 **J.C. 786**

SINGAPORE

Moneylenders Ordinance (*Laws of the Colony of Singapore*, 1955 *Ed.*, *c.* 193), *s.* 2 (*d*) - - - - - **J.C. 178**

RHODESIA

Emergency Powers Regulations, 1956, *of Northern Rhodesia*, *regs.* 16 (1), 47 **J.C. 336**

BAHRAIN

Bahrain (*Removal of Prisoners*) *Order*, 1956 (*S.I.* 1956, *No.* 2031) - - **J.C. 786**

Prisoners Removal (*Bahrain and St. Helena*) *Order*, 1956 (*S.I.* 1956, *No.* 2032) **J.C. 786**

Copyright Royalty System (*Records*) *Regulations*, 1957 (*S.I.* 1957, *No.* 866), *para.* 1 - - - **H.L.(E.) 87**

R.S.C., *Ord.* 58, *rr.* 3 (1), 9 (3) **H.L.(E.) 965**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

[HOUSE OF LORDS.]

GREY AND ANOTHER . . . . APPELLANTS;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*

1959
July 23, 27;
Nov. 2.

Revenue—Stamp duty—Gifts inter vivos—Oral settlement—Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74—*Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Meaning of "disposition"—Oral declaration by cestui que trust directing trustees to hold his interest on new trusts—Law of Property Act, 1925, *s.* 53 (1) (*c*).

Statute—Construction—Consolidating Act—Amending Acts consolidated—Principles of construction—Law of Property Act, 1925, *s.* 53 (1) (*c*).

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

LORD REID was present at the hearing in the Appellate Committee but not at the consideration of their report.

By section 53 (1) (*c*) of the Law of Property Act, 1925: "a "disposition of an equitable interest or trust subsisting at the time "of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised "in writing or by will."

In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the settlement of 1950, to the intent that such direction should result in the entire exclusion of H. from all future right, title and benefit to or in the shares and the income thereof. On March 25, 1955, the appellants executed six declarations of trust which H., although not expressed to be a party thereto, executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund. The six declarations of trust were assessed to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held, that the directions given by H. were dispositions by him of his equitable interest in the shares within the meaning of section 53 (1) (*c*) of the Act of 1925 and, because they were not made in writing, as required by that provision, they were ineffective. The word "disposition" in that provision must be given the wide meaning which it bears in normal usage.

Accordingly the declarations were rightly assessed to ad valorem stamp duty.

The Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924, profoundly altered a large part of the law of real and personal property, and the Act of 1925, though a consolidating Act, in fact consolidated Acts which were themselves amending Acts. Accordingly, no principle of construction imposed on these Acts an interpretation appropriate to a consolidating Act, and each word must be given the meaning proper to it in the context.

Decision of the Court of Appeal [1958] Ch. 690; [1958] 3 W.L.R. 45; [1958] 2 All E.R. 428 affirmed.

APPEAL from the Court of Appeal (Morris and Ormerod L.JJ., Lord Evershed M.R. dissenting).

This was an appeal from an order of the Court of Appeal dated May 15, 1958, allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the Chancery Division (Queen's Remembrancer) of the High Court of Justice (Upjohn J.) dated December 3, 1957, whereby there was allowed an appeal by the appellants, Arthur William Grey and Leslie Richard Randolph, from assessments of stamp duty by the respondents on six instruments presented to them on behalf of the appellants under section 12 of the Stamp Act, 1891, for the opinion of the respondents as to the stamp duty with which they were chargeable. The question was whether or not the instruments were chargeable with ad valorem duty. Upjohn J. held that they were not so chargeable. The Court of Appeal decided to the contrary.

The facts as stated in the case stated by the Commissioners of Inland Revenue were summarised in the opinion of Viscount Simonds as follows:

(A) The appellants were trustees of six settlements, each of which was made between a Mr. Hunter as settlor of the one part and the appellants as trustees of the other part. Four of these settlements were respectively dated July 22, 1949, and a fifth was dated August 9, 1949, and each settlement directed the appellants to stand possessed of the property comprised therein upon the trusts thereby declared for the benefit of a named grandchild of Mr. Hunter and such other trusts as therein appearing. All the said five settlements were in similar form. The sixth settlement was dated May 1, 1950, and the appellants were thereby directed to stand possessed of the property comprised therein upon the trusts thereby declared for the benefit of the then existing and future grandchildren therein specified of Mr. Hunter.

(B) By an instrument of transfer dated February 1, 1955, Mr. Hunter transferred to the appellants 18,000 ordinary shares of £1 each in Sun Engraving Co. Ltd. (hereinafter called "the company"), to be held by the appellants as nominees for and to the order of Mr. Hunter.

(C) At a meeting held on February 18, 1955, at the offices of the company at which there were present Mr. Hunter and the appellants and Mr. Graham Wyatt Williams, solicitor, Mr. Hunter orally and irrevocably directed the appellants to divide the said 18,000 shares in the company into six equal parcels of 3,000 shares each and to hold one of such parcels upon the trusts and with and subject to the powers and provisions respectively

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declared and contained in each of the said six settlements to the intent that such directions should result in the entire exclusion of Mr. Hunter from all further right, title and benefit to or in the said shares or any of them and the income thereof.

(D) By six deeds of declaration of trust each dated March 25, 1955, and executed by the appellants and Mr. Hunter, after reciting in each such deed that the appellants were the holders of 3,000 ordinary shares in the company and that on February 18, 1955, Mr. Hunter orally and irrevocably directed the appellants to hold the said shares upon the trusts and subject to the powers and provisions in such one of the said settlements as was therein mentioned and that the appellants had thereupon assented to and accepted the trusts reposed in them by the said direction and that the giving of the said direction on the said February 18, 1955, and in manner aforesaid and the nature thereof were testified by the execution by Mr. Hunter of that deed, it was witnessed and the appellants thereby acknowledged and declared (in each of the said deeds) that they had been since February 18, 1955, and were then holding 3,000 shares therein mentioned and the income thereof upon such trusts and with and subject to such powers and provisions as were in the relevant settlement declared and contained concerning the trust fund as therein defined to the intent that the said shares should since the said February 18, 1955, form an addition to and be one fund with the said trust fund for all purposes.

John Pennycuick Q.C. and *W. T. Elverston* for the appellants. This case does not turn on the technicalities of the stamp duty legislation, but on the construction of section 53 of the Law of Property Act, 1925, a part of the general law, which re-enacted with amendments three sections of the Statute of Frauds (29 Car. 2, c. 3).

The question is this: If X holds property in trust for A as absolute equitable owner and A then directs X to hold the property on the settlement trusts for the benefit of B, C and D, and X accepts the trust, is that direction a " disposition " of a subsisting equitable interest within the meaning of section 53?

Section 9 of the Statute of Frauds, one of the Acts consolidated by the Act of 1925, refers to " all grants and assignments." Section 53 (1) (*c*) of the Act of 1925 introduces the word " disposition " —" a disposition of an equitable interest." " Disposition " must have the same meaning as " grants and assignments " in the earlier Act.

The Act of 1925 was a consolidating Act and was so expressed. The Statute of Frauds was not amended by the abortive Law of Property Act, 1922. So far the judges who have heard this case have held that this transaction would not have been within the scope of the Statute of Frauds.

Section 53, which is a mere consolidation of sections 3, 7 and 9 of the Statute of Frauds, has no application to this form of transaction, and so Hunter's direction of February 18, 1955, was effective to create a trust of the 18,000 shares but was not a grant or assignment.

An equitable owner can assign his equitable interest to another and can declare himself trustee of his equitable interest for another. He can also direct the legal owner to hold the property on trust for another instead of himself, and, if this direction is accepted by the legal owner, the direction creates a trust in favour of that other. The equitable interest can also be transferred by contract of sale under the equitable doctrine of conversion.

Take property held by X in trust for A, so that A is the equitable owner. A gives a direction to X to hold it on certain trusts and X accepts that direction. A is in a position to create and does create an effective trust of the property in the hands of X. That is the present transaction. It is a creation of a trust and not an assignment. The old trusts have ceased to exist and the legal owner holds on new trusts.

The holder of an equitable interest can direct the trustee to transfer it to another and that is a revocable mandate; if he informs the transferee, there is a good transfer and the trustee must then hold the property for him on the same terms as he held for the original holder.

Under the law before January 1, 1926, an assignment was within section 9 of the Statute of Frauds, but the creation of a trust was not: see *M'Fadden* v. *Jenkyns*.[1] This case is not relied on for its decision on the facts, but for the statement by Lord Lyndhurst L.C. There is no authority to the contrary. After that date in order to be effective the creation of a trust is not required to be in writing signed by the disponor or his agent any more than before.

The only authority which comes near the present case is *Cohen and Moore* v. *Inland Revenue Commissioners*.[2]

The words "grants and assignments" in section 9 of the

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[1] (1842) 1 Hare 458; 1 Ph. 153, 157.

[2] [1933] 2 K.B. 126.

Statute of Frauds must indicate a passing of property from one person to another. They are not apt to cover the creation of a trust. The operation here is different from an assignment. If an equitable owner directs the legal owner to hold on trusts which, for some reason, do not exhaust the whole of the beneficial interest in the property, the original equitable owner's interest remains in him to that extent.

In *Timpson's Executors* v. *Yerbury*[3] Romer L.J. enumerated the ways in which an equitable interest in the hands of trustees can be disposed of. Suppose the subject-matter of the trust is a silver cup which X holds for A as beneficial owner. A can say to B: "I hereby assign to you my interest in the cup." That is within section 9. Or A can say: "I hereby declare myself "to be trustee for B of my equitable interest in the cup." That would not be a grant or assignment within section 9. Or again A can say to X: "I direct you to hold the cup in trust for B." If X accepts that trust, the effect is that A creates a new trust in favour of B, and that does not involve a grant or assignment of the equitable interest. Romer L.J. also mentions a contract for valuable consideration to assign an equitable interest.

A direction to hold in trust is distinct from a direction to hand over. If A directs X to hold the cup in trust for B, who is an infant at the time, and on his attaining 21 years to hand it over to him and X accepts the trust, that direction creates a new trust. It is different in legal quality from an assignment of an equitable interest to the infant B. A new equitable interest is created.

Tierney v. *Wood*[4] is a case in point on the whole of this question. It indicates that in such a case as this the owner by declaring trusts has not assigned his beneficial interest in the property, but has created new ones; his own has ceased to exist without any express provision. The distinction between an assignment of an equitable interest and a creation of an equitable interest is vital.

It is not contended that section 53 removed a disability which existed under the Statute of Frauds. What the Court of Appeal held was that section 53 by using the word "disposition" had altered the law. The three paragraphs of section 53 (1) must be considered with the corresponding sections of the Statute of Frauds in order to find their true construction. The Act of 1925, being a consolidating Act, was unlikely to effect substantial changes in the law: see *In re Turner's Will Trusts.*[5] See also Schedule VII. In Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. I, p. 321, it is said that section 53 reproduces with amendments sections 3, 7, 8 and 9 of the Statute of Frauds; there is no suggestion that the substance of the law was altered. The word " disposition " in section 53 is limited in its meaning to grants and assignments. The modern equivalent of a grant or assignment is a conveyance. It was on the meaning of " disposition " that the Court of Appeal decided against the appellants. What was done here was to create an equitable interest which overrode the old equitable interest.

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[3] [1936] 1 K.B. 645, 664; [1936] 1 All E.R. 186.

[4] (1854) 19 Beav. 330.

The reasoning in *In re Chrimes*[6] is hard to follow. If the judge was saying that the owner of a beneficial interest cannot declare a trust in it, he was wrong. But a direction by the owner of a limited interest to trustees of the trust property to hold that limited interest in trust for another would be misconceived because the trustees do not hold the limited interest but the trust property. *Timpson's* case[7] turned on the particular instructions there given. The judgment in *Martin* v. *Inland Revenue Commissioners*[8] is of no significance in relation to the different question here to be considered, namely, whether the direction amounted to a disposition of a subsisting equitable interest within the meaning of this section. The meaning of a word may vary according to the context. The present question arises wholly under the general law.

As to the construction of consolidating statutes, see *Gilbert* v. *Gilbert*[9] and *In re Eichholz.*[10]

Here one must look at the nature of the transaction. Then one must see whether it came within the wording of section 9 of the Statute of Frauds. If it did not, one must see whether it comes within section 53 of the Act of 1925, considered in the light of the Statute of Frauds, particularly with reference to the insertion of the word " disposition." In Schedule VII of the Act of 1925, dealing with repeals, the wording dealing with the Statute of Frauds is striking and in notable contrast with other parts of the same Schedule. Section 53 merely represents a change of draftsmanship. It is correctly stating the law as it previously existed in the light of the Wills Act, 1837, a testamentary disposition being covered as well.

[5] [1937] Ch. 15, 24–26; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

[6] [1917] 1 Ch. 30.

[7] [1936] 1 K.B. 645, 668.

[8] (1930) 15 A.T.C. 631.

[9] [1928] P. 1, 8–9; 43 T.L.R. 589.

[10] [1959] Ch. 708; [1959] 2 W.L.R. 200, 210–211; [1959] 1 All E.R. 166.

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As a preliminary to consolidation, and in order to facilitate it, the Law of Property (Amendment) Act, 1924, wrote the Statute of Frauds in modern language and the new provisions were consolidated.

R. O. Wilberforce Q.C. and *E. B. Stamp* for the respondents. The question is whether Hunter on February 18, 1955, purported to make a disposition of his subsisting equitable interest. On this question it is submitted: (1) If the word "disposition" in section 53 of the Act of 1925 bears the ordinary meaning of that word, the transaction was an attempted disposition. (2) The word "disposition" has its ordinary meaning in section 53 and this is not cut down by the context or the definitions in the Act, nor by reference to the Statute of Frauds. (3) If it is necessary to look at the Statute of Frauds the result is the same and the direction to the trustees operates as a grant or assignment within the meaning of section 9.

It would be strange if what Hunter did in relation to his subsisting equitable interest was not a "disposition." What he was trying to do appears from the second recital in the declaration of trust of March 25, 1955, in the words "to the intent that the "said direction should and it thereby did immediately result in "the entire exclusion of Mr. Hunter from all future right, title and "benefit to or in the said shares . . ." The word "disposition" is apt to include an act by an owner of property the legal effect of which is that he ceases to be the owner of that property.

The matter must be looked at, not from the point of view of the new interest which was to be vested in the trustees, but from that of the interest vested in the settlor up to the time the direction was given. It is a false distinction to differentiate between a document or act which is, and one which operates as, a disposition. In considering whether there has been a disposition, it is not necessary to be able to identify or recognise the subject-matter of the disposition afterwards. A surrender of a life interest has been held to be a disposition: see *Inland Revenue Commissioners* v. *Buchanan*.[11] So also where a power of appointment is exercised so as to cause a certain equitable interest to disappear and be superseded by other equitable interests: see *Stanyforth* v. *Inland Revenue Commissioners*[12] and *Fuller* v. *Inland Revenue Commissioners*.[13]

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[11] [1958] Ch. 289, 296; [1957] 3 W.L.R. 68; [1957] 2 All E.R. 400.

[12] [1930] A.C. 339; 46 T.L.R. 288.

[13] [1950] 2 All E.R. 976; 29 A.T.C. 278.

It cannot be said that there was not a disposition here. There was a declaration of trust, but it does not follow that that is to be equated with a declaration of oneself as trustee. Here there is no contrast between a declaration of trust and a disposition. There is a contrast between a declaration of oneself as trustee and a declaration of a trust in the hands of others. The former involves a disposition of the beneficial interest in property, but not a disposition of a subsisting equitable interest.

Taking the definition of "conveyance" in section 205 (1) (ii) of the Act of 1925, if the present transaction does not fall within the words "every other assurance of property" and the word "disposition" has as its normal meaning a sense wider than "assurance," there is no reason for not giving it that wider sense: see *In re Eichholz*.[14]

The Act of 1924 must be considered on its merits without any presumptions. Part II of Schedule III deals with the "provisions "facilitating consolidation of the law of property and conveyan"cing," but to facilitate consolidation is not the same thing as consolidation itself.

It was thought for a long time that section 9 of the Statute of Frauds only related to equitable interests in land: see Lewin on Trusts, 4th ed. (1861), p. 451, to 12th ed. (1911), p. 890, and the American Restatement of the Law of Trusts, vol. I, section 139. But it applies to all assignments. There are differences in language and subject-matter between that section and section 53 of the Act of 1925; if any difference is substantial the latter must prevail. Paragraph 15 of Schedule III to the Act of 1924 deals with the Statute of Frauds. Section 2 of that statute is thereby substantially changed. So is section 8. The whole form of section 9 is changed and there is a substantial addition. The provision in paragraph 15 eventually embodied in section 55 of the Act of 1925, a saving section, is significant.

In re Eichholz [15] was decided under a different Act and is not binding in the present case. In *Gilbert's* case [16] there was merely stated a principle which is not in dispute. As to the relations between the amending Act and the substantive Act in the legislation of 1925, see *Turner's* case.[17]

It is a fundamental principle that there are only two ways of creating a trust inter vivos, whether the subject-matter is legal or equitable: (1) for the owner of the property to declare himself a trustee, and (2) for him to assign his interest in the property to others to hold as trustees: see *Richards* v. *Delbridge* [18] and *Milroy* v. *Lord*.[19] The appellants do not contend for a tertium quid. The present case falls under the second head. It differs from the ordinary straightforward case of a transfer to trustees because existing trustees are made use of instead of new trustees being brought in. As to the modes of completely constituting a trust, see Snell on Equity, 24th ed., p. 107 et seq., *Rycroft* v. *Christy* [20] and *Lambe* v. *Orton*.[21] There is no special form of words required for an assignment. In general a trustee is bound to accept the directions of his beneficiaries. As to *Tierney* v. *Wood* [22] and *Bentley* v. *Mackay*,[23] the present argument for the Crown was not needed in the former case, while the latter case turned on its own particular facts and not on section 9 of the Statute of Frauds.

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[14] [1959] 2 W.L.R. 200, 212.
[15] [1959] 2 W.L.R. 200.
[16] [1928] P. 1.
[17] [1937] Ch. 15, 26–27.

A direction to trustees can be an assignment: see *In re Chrimes*,[24] *Timpson's* case [25] and *In re Wale*.[26] Here the direction to the trustees to hold on new trusts was an assignment. The last case is a valuable supplement to the other two. *Martin's* case [27] is not a case of an absolute making over of an equitable interest: see also the report in Sergeant on Stamp Duties, 3rd ed. (1957), p. 350.

Section 62 of the Act of 1925 supports the contention that this is a conveyance or disposition.

E. B. Stamp following. The original transfer of February 1, 1955, was stamped with the duty of 10s. If the beneficial interest had then passed, there would have been a liability to ad valorem duty.

The Statute of Frauds was meant "for prevention of many "fraudulent practices, which are commonly endeavoured to be "upheld by perjury." It must be construed according to the mischief at which it was directed.

What Jessel M.R. said in *Richards* v. *Delbridge* [28] applies as much to equitable ownership as to legal ownership. This is supported by *In re Chrimes*,[29] *Timpson's* case [30] and the closing passage in *Lambe* v. *Orton*.[31]

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[18] (1874) L.R. 18 Eq. 11.

[19] (1862) 4 De G.F. & J. 264.

[20] (1840) 3 Beav. 238, 241.

[21] (1860) 1 Dr. & Sm. 125, 127.

[22] 19 Beav. 330, 337–338.

[23] (1851) 15 Beav. 12, 20–21.

[24] [1917] 1 Ch. 30.

[25] [1936] 1 K.B. 645, 663.

[26] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280.

[27] 15 A.T.C. 631.

[28] L.R. 18 Eq. 11, 14.

[29] [1917] 1 Ch. 30.

[30] [1936] 1 K.B. 645.

[31] 1 Dr. & Sm. 125.

[VISCOUNT SIMONDS intimated that it would be convenient to hear argument in reply on the consolidation point, which was the crucial matter.]

John Pennycuick Q.C. in reply. The procedure for consolidation was contained in the Acts of 1922, 1924 and 1925. The Act of 1922 enacted several changes in the law. Its coming into operation was delayed until a future date which was ultimately January 1, 1926. The Act of 1924 was enacted in December, 1924, and was to come into force on January 1, 1926. Section 3 provided: "The amendments and provisions for facilitating the "consolidation of the statute law relating to conveyancing and "property contained in Schedule III," and sections 4, 5, 6, 7 and 8 use the same formula. Part I of Schedule III dealt with "amendments," and was so headed, and certain amendments were thereby effected. But Part II dealt with and was headed: "Provisions Facilitating Consolidation of the Law of Property and "Conveyancing." It was paragraph 15 of this Part which dealt with the Statute of Frauds. This Part dealt partly with the principal Act and partly with other Acts. One would not expect changes in the law to be interlaced in that way unless they are clearly indicated. In this Part three distinct forms of words are used. (1) In paragraph 3 there is a repeal of an existing provision. (2) In paragraphs 31 and 32 the formula used is: "The following "provisions shall be substituted. . . ." As to the effect of such a substitution, see *In re Eichholz*.[32] (3) The formula in paragraph 15 is: "Sections 1 to 3 and 7 to 9 of the Statute of Frauds "shall take effect as if inserted in the principal Act and be read "as follows: . . ." Thus these six sections are inserted into the principal Act and read into it. It is true that there are alterations of wording, but if the draftsman had intended to make substantial amendments the apt wording would have been to say that the sections were repealed. It is not contended that these provisions must be construed on the basis that they effected no alteration at all in the law as it stood under the Statute of Frauds, but, having regard to the formula used, they should not be construed as effecting any alteration where there is some other explanation of the change of language. Now, the appellants' construction involves no alteration in the law. "Disposition" should be construed as "grants and assignments" would have been construed before the Act of 1922. The old words were archaic and the new expression was put in. The provisions of the Wills Act explain the change of language.

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[32] [1959] Ch. 708; [1959] 2 W.L.R. 200, 210–211.

Here one is not simply interpreting a consolidation Act; one is construing provisions to facilitate consolidation. One would not expect such provisions to effect major changes, least of all when prefaced by the particular formula used here.

If the true view is that the transaction in the present case amounted to a transfer by Hunter of his equitable interest to the beneficiaries under the settlement, that was a "grant" or "assignment" under the terms of the old law. But the appellants' case is that it was not a grant or assignment or a disposition.

The definition of "conveyance" in section 205 (1) (ii) of the Law of Property Act, 1925, affords an explanation for the use of the word "disposition" in section 53 (1) (*c*) instead of "grants "and assignments." See also the extended definition of "con-"veyance on sale" in section 54 of the Stamp Act, 1891. By reason of that definition the exercise of a power of appointment would be a disposition, but it would not be a "conveyance" of the appointed interest within the Act of 1925, as defined therein.

Their Lordships took time for consideration.

November 2. VISCOUNT SIMONDS, having stated the facts, continued: These facts give rise to the plain question whether the oral directions given by Mr. Hunter, which are recited in each of the instruments, were effective or were, having regard to section 53 (1) (*c*) of the Law of Property Act, 1925, wholly ineffective. In the former event the instruments would not, and in the latter would, be chargeable with ad valorem duty.

Section 53 (1) of the Act is as follows: "Subject to the "provisions hereinafter contained with respect to the creation of "interest in land by parol, . . . (*c*) a disposition of an equitable "interest or trust subsisting at the time of the disposition, must "be in writing signed by the person disposing of the same, or by "his agent thereunto lawfully authorised in writing or by will."

Briefly, then, were the several oral directions given by Mr. Hunter dispositions by him of the equitable interest in the shares held by the appellants as nominees for him?

If the word "disposition" is given its natural meaning, it cannot, I think, be denied that a direction given by Mr. Hunter, whereby the beneficial interest in the shares theretofore vested

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in him became vested in another or others, is a disposition. But it is contended by the appellants that the word "disposition" is to be given a narrower meaning and (so far as relates to inter vivos transactions) be read as if it were synonymous with "grants and assignments" and that, given this meaning, it does not cover such a direction as was given in this case. As I am clearly of the opinion, which I understand to be shared by your Lordships, that there is no justification for giving the word "disposition" a narrower meaning than it ordinarily bears, it will be unnecessary to discuss the interesting problem that would otherwise arise. It was for this reason that your Lordships did not think it necessary to hear learned counsel for the appellants in reply on this part of the case.

My Lords, the argument for narrowing the meaning of "disposition" was that the Law of Property Act, 1925, was a consolidating Act, that among the Acts which it consolidated was the Statute of Frauds (29 Car. 2, c. 3), s. 9, that that section enacted that "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect," and that therefore the word "disposition" in section 53 (1) (*c*) of the Act of 1925 is to be given the same meaning as would be given to "grants and assignments" in section 9 of the Statute of Frauds.

My Lords, the principles applicable to the construction of a consolidating Act are not in doubt. The presumption is that such an Act is not intended to alter the law, but this prima facie view must yield to plain words to the contrary: see *Gilbert* v. *Gilbert*,[1] *per* Scrutton L.J. If the Law of Property Act, 1925, was a typical consolidating Act, the question would be whether the alteration from "grants and assignments" to "disposition" changed the law by enlarging the area of void transactions—a question that might not be easy to answer. But the Act of 1925 cannot be thus regarded. It was, it is true, a consolidating Act, but it was, with a number of other Acts, the culmination of a body of legislation by which a large part of the law of real and personal estate was profoundly altered. The story opens with the Law of Property Act, 1922, the title of which begins with the words: "An Act to assimilate and amend the law of Real and Personal Estate." It in fact effected comprehensive changes in the law. Section 191 (2) enacted that it should come

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[1] [1928] P. 1, 8; 43 T.L.R. 589.

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into operation on January 1, 1925. But it did not, and was never intended to, come into operation at all. In 1924 a second Act was passed. It was entitled: "An Act to amend the Law "of Property Act, 1922, and the enactments thereby affected, and "to facilitate the consolidation of the law relating to conveyan- "cing and property," and other matters. This Act, which was the result of a prolonged examination of the Law of Property Act, 1922, by a committee presided over by the late Lord Romer, paved the way for the Act of 1925. It was, as has already appeared, an Act amending an Act which had itself radically changed the law. Section 3 is for our present purpose the only relevant section. It provided that "The amendments and provisions, for "facilitating the consolidation of the statute law relating to con- "veyancing and property, contained in Schedule III to this Act "shall have effect." This Schedule was in two parts, Part I being entitled "Amendments" and Part II "Provisions facilitat- "ing consolidation of the law of property and conveyancing." Paragraph 15 of Part II is, so far as is material, as follows: "Sections 1 to 3 and 7 to 9 of the Statute of Frauds shall take "effect as if inserted in the principal Act and be read as follows": There then follow the provisions which are exactly reproduced in section 53 of the Act of 1925. It was provided by section 12 (3) that the Act should come into operation on January 1, 1926. In the meantime the Law of Property Act, 1925, was drafted embodying the alterations in the law relating to conveyancing and property made by the Acts of 1922 and 1924. It repealed section 3 of and Schedule III to the Act of 1924 and itself came into force on January 1, 1926. I have only dealt in rough outline with the complicated scheme of legislation which transformed the law of real and personal property. But I have said enough to show that the Act of 1925, though in a sense a consolidating Act, in fact consolidated Acts which themselves were amending Acts. While, therefore, as Lord Romer (then Romer L.J.) indicated in *In re Turner's Will Trusts* [2] in the comparable case of the Trustee Act, 1925, it is incredible that the legislature intended in the Act of 1925 to make further and radical changes in the law as enacted in preceding Acts, the question is what changes had been effected in those Acts. And since they purported to be and were amending Acts, there is no principle of construction which should impose upon them an interpretation appropriate to

[2] [1937] Ch. 15, 26; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

a consolidating Act. They must, and therefore so must the Act of 1925, be construed so as to give each word the meaning proper to it in its context. So construed the word "disposition" in section 53 (1) (*c*) has the natural meaning which I attributed to it at the opening of this opinion.

I have not, my Lords, forgotten the contention that, as the relevant provisions substituting what became section 53 of the Act of 1925 for certain sections of the Statute of Frauds are to be found in Part II of Schedule III to the Act of 1924, whereas Part I was headed "Amendments," the provisions in Part II ought not to be read as amending the existing statutory law if any other reasonable interpretation is possible. But I cannot give any weight to this argument, for the most cursory glance reveals that the provisions in Part II, even those in paragraph 15 itself, contain what are undeniably amendments of the law. Accordingly, I cannot allow this argument to prevail and must read section 53 of the Act of 1925 as I read paragraph 15 of Schedule III to the Act of 1924 in the sense which I have already indicated.

I think it right to add that the argument for the Crown which has brought me to this conclusion does not appear to have been put before Upjohn J. or the Court of Appeal.

The appeal must, in my opinion, be dismissed with costs.

My noble and learned friend, Lord Reid, who is unable to be here today, has intimated to me that he agrees with this opinion.

Lord Radcliffe. My Lords, if there is nothing more in this appeal than the short question whether the oral direction that Mr. Hunter gave to his trustees on February 18, 1955, amounted in any ordinary sense of the words to a "disposition of an "equitable interest or trust subsisting at the time of the "disposition," I do not feel any doubt as to my answer. I think that it did. Whether we describe what happened in technical or in more general terms the full equitable interest in the 18,000 shares concerned, which at that time was his, was (subject to any statutory invalidity) diverted by his direction from his ownership into the beneficial ownership of the various equitable owners, present and future, entitled under his six existing settlements.

But that is not the question which has led to difference of opinion in the courts below. Where opinions have differed is on the point whether his direction was a "disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925, the argument for giving it a more restricted meaning in that context being that section 53 is to be construed as no more than a consolidation of three sections of the Statute of Frauds, sections 3, 7 and 9. So treated, "disposition," it is said, is merely the equivalent of the former words of section 9, "grants "and assignments," except that testamentary disposition has to be covered as well, and a direction to a trustee by the equitable owner of the property prescribing new trusts upon which it is to be held is a declaration of trust but not a grant or assignment. The argument, concludes, therefore, that neither before January 1, 1926, nor since did such a direction require to be in writing signed by the disponor or his agent in order to be effective.

In my opinion, it is a very nice question whether a parol declaration of trust of this kind was or was not within the mischief of section 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be. Certainly it was long established as law that while a declaration of trust respecting land or any interest therein required writing to be effective, a declaration of trust respecting personalty did not. Moreover, there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9 and therefore required writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee.

I do not think, however, that that question has to be answered for the purposes of this appeal. It can only be relevant if section 53 (1) of the Law of Property Act, 1925, is treated as a true consolidation of the three sections of the Statute of Frauds concerned and as governed, therefore, by the general principle, with which I am entirely in agreement, that a consolidating Act is not to be read as effecting changes in the existing law unless the words it employs are too clear in their effect to admit of any other construction. If there is anything in the judgments of the majority of the Court of Appeal which is inconsistent with this principle I must express my disagreement with them. But, in my opinion, it is impossible to regard section 53 of the Law of Property Act, 1925, as a consolidating enactment in this sense. It is here that the premises upon which Upjohn J. and the Master of the Rolls founded their conclusions are, I believe, unsound.

The Law of Property Act, 1925, itself was, no doubt, strictly a consolidating statute. But what it consolidated was not merely the Law of Property Act, 1922, a statute which had itself effected massive changes in the law relating to real property and conveyancing, but also the later Law of Property (Amendment) Act, 1924. The Statute of Frauds sections had not been touched by the Act of 1922; but they were in effect repealed and re-enacted in altered form by the operation of section 3 of the Act of 1924 and the provisions of Schedule III to that Act. The Schedule is divided into two Parts, the contents of Part I being described simply as "Amendments" and the contents of Part II being headed by the description "Provisions facilitating consolidation. . . ." I suppose that the authors of the Act of 1924 understood what was the significance of the division of Schedule III into these two Parts under their different headings. I cannot say that I do. Each Part, when examined, is seen to contain numerous amendments of various previous statutes relating to real property and conveyancing, apart from the Act of 1922 itself, and in this sort of matter I cannot see how one can satisfactorily measure the degrees of substance involved in the various changes. The point is that they were avowedly changes. It is paragraph 15 of Part II of Schedule III which deals with the Statute of Frauds: and though the introductory words do seem to suggest that the sections concerned are only being re-enacted in different words, it is apparent, when they are read through, that this is not so and that alterations of more or less moment are in fact being made. This new wording is what is carried into section 53 of the Act of 1925.

For these reasons I think that there is no direct link between section 53 (1) (*c*) of the Act of 1925 and section 9 of the Statute of Frauds. The link was broken by the changes introduced by the amending Act of 1924, and it was those changes, not the original statute, that section 53 must be taken as consolidating. If so, it is inadmissible to allow the construction of the word "disposition" in the new Act to be limited or controlled by any meaning

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attributed to the words "grant" or "assignment" in section 9 of the old Act.

I agree that the appeal should be dismissed.

LORD COHEN. My Lords, I also agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Soames; Solicitor of Inland Revenue.*

F. C.

J. C.*

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PONOKA-CALMAR OILS LTD. AND ANOTHER . APPELLANTS;

AND

EARL F. WAKEFIELD CO. AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Alberta—Mines and minerals—Mechanics' lien—"Owner"—Oil well—Drilling contractor's claim to lien—Whether work done for an "owner" as defined—Sale of severed oil—Fund in hands of receiver appointed by court—Rights of lienholder against fund—Mechanics' Lien Act, R.S. of Alberta, 1942, *c.* 236 (*as amended to* 1951, *R.S.* 1955, *c.* 197), *ss.* 2 (*a*) (*c*) (*g*), 6, 36, 37, 43.

By section 43 of the Mechanics' Lien Act, 1942, of Alberta, "owner" as defined in section 2 (*g*) is extended to include "every "person having any estate, interest or right in the oil or gas in "place or in the oil or gas when severed notwithstanding that such "person has not requested the contract work to be done, is only "indirectly benefited thereby and has had no dealing or contractual "relationship with the contractor or person claiming the lien."

The third respondent, who was the registered owner of an estate in fee simple in 80 acres of land in Alberta, on May 31, 1948, granted to lessees a lease of all petroleum and natural gas to be found under the land. On September 10, 1949, the first respondents, contractors, on the instructions of one H. and one M. began to drill an oil well on the land on the authority of a permit issued by the Petroleum and Natural Gas Conservation Board of Alberta to the second respondents, a company in which H. and M. were the only shareholders. Nine days later, on September 19, an agreement was made between the first and second respondents whereby the former, for a stipulated remuneration, undertook to drill a well for the production of oil and gas on the land. On September 21, the lessees from the third respondent assigned to the appellants their title to and interest in the oil and gas rights.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD DENNING.

On September 24 an agreement (the pooling agreement) was made between the appellants (described as "the owners"), the second respondents (described as the "operator"), a trust company (therein called the "trustee"), and H. and M., whereby the appellants assigned to the trust company all their rights in the land and in the production of natural gas and hydrocarbons therefrom, and it was thereby provided that all the gross proceeds of wells drilled in the land under the agreement were to be divided by the trust company in certain defined proportions between the appellants, H. and M. and the second respondents. The agreement recited that H. and M. had assisted in arranging for the drilling.

The first respondents had received no payment for work done under the agreement of September 19, and on October 22, under a permit from the conservation board, they plugged and abandoned the well. In January, 1950, the well was deepened and subsequently completed by other contractors and had produced a considerable quantity of oil.

The first respondents filed mechanics' liens under the Mechanics' Lien Act against the land, and by action claimed a declaration that the liens were good, valid and subsisting liens, judgment against the second respondents for $65,745.62, and the appointment of a receiver pursuant to section 36 of the Act. An order in the action was made on the application of the appellants, and assented to by the first respondents, appointing the trust company receiver to operate the well and to receive all moneys from the sale of oil or other productions pending settlement of the action, and to pay them into a special trust account to the credit of the action to await further order:—

Held, first (without deciding whether the drilling done by the first respondents from September 10 was done with the privity and consent of the lessees from the third respondents), that the drilling work carried out before the date of the contract of September 19 having been expressly contemplated in the pooling agreement of September 24, the appellants vis-à-vis the second respondents had ratified and bound themselves to the latters' recognition and inclusion of the work done previously. The appellants were therefore "owners" within the meaning of sections 2 (*g*) and 6 as extended by section 43, on whose behalf the first respondents had done the work in respect of which the liens were claimed, and the liens were accordingly validly filed.

Secondly, that the first respondents had the same rights against the special fund in the hands of the receiver arising from the sale of oil as they would have had against the land itself, including the oil and gas whether severed or not. Further, the moneys paid into the special fund by the receiver were moneys "realised by proceedings under this Act" within the meaning of

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section 37 of the Act, and must be applied and distributed in the prescribed order to the persons named in that section. The lien-holders mentioned in the section were those persons who had at the time of a sale a lien on the property sold and brought their action to enforce it.

Judgment of the Supreme Court of Canada [1958] S.C.R. 361 affirmed.

Appeal (No. 7 of 1959), by special leave, from a judgment of the Supreme Court of Canada (Kerwin C.J., Rand, Locke, Fauteux and Abbott JJ.) (April 22, 1958) allowing in part an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (Ford C.J.A., Macdonald, McBride, Porter and Johnson JJ.A.) (June 25, 1957) which had allowed an appeal from a judgment of the Trial Division of the Supreme Court of Alberta (McLaurin C.J.) (March 14, 1956) whereby it was declared that the present first respondents had a good, valid, binding and subsisting lien under the Mechanics' Lien Act against all mines and minerals within, upon or under certain lands in the province of Alberta, and the first respondents were held entitled to recover $30,000 from funds held by a receiver appointed by the court.

The following facts are taken from the judgment of the Judicial Committee: At all material times the third respondent, Harry Szpilak, was the registered owner of an estate in fee simple in certain lands in Alberta, 80 acres in extent, subject to a reservation in favour of the Canadian Pacific Railway Co. of all coal. On May 31, 1948, he granted to five named individuals (including one Duitman and one Morrisroe) a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, upon, or under the said land. By the lease the lessees were obliged to commence a well for petroleum and natural gas within two years from the date of the lease and thereafter continuously to carry on the work until either petroleum oil or gas should be struck in a quantity of at least 30 barrels per day, or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease.

On September 10, 1949, the first respondents, Earl F. Wakefield Co., on the instructions of one Harding and one McMullen, began to drill an oil well on the said lands. It had by September 23 reached a depth of 2,570 feet. The drilling was commenced on the authority of a permit issued before drilling to the second respondents, Oil City Petroleums (Leduc) Ltd., which was in fact not incorporated until September 19, the only shareholders being

Harding and McMullen, of whom the former was treasurer, and the latter secretary of the company.

On September 19, 1949, an agreement was made between the first respondents (described as " contractor ") and the second respondents (described as " owner ") whereby the first respondents undertook to drill a well for the production of oil and gas on the said lands. Drilling was to commence on or before September 15 and the first respondents were to be remunerated by the payment of $50,000 for the work therein mentioned and of certain other sums. It was further provided that the first respondents were to receive $10,000 when the well was spudded and other periodic payments, and that the second respondents should deposit with the Prudential Trust Co. a sum of $40,000 upon which the first respondents could draw as the work progressed.

On September 21 the lessees from the third respondent assigned to the first appellants, Ponoka-Calmar Oils Ltd., all their right, title and interest in and to the oil and gas rights in the said lands, and the latter assumed all the obligations of the lessees to the third respondent under the lease.

On September 23 the first respondents, having by then drilled the well to the depth of 2,570 feet, told the second respondents that they would drill no further until they were paid for the work which they had done in accordance with the agreement of September 19.

On the next day an agreement was made between the two appellants (described as " the owners ") of the first part, the second respondents (described as " the operators ") of the second part, the Prudential Trust Co. Ltd. of the third part, and Harding and McMullen of the fourth part. Thereby the appellants assigned to the trust company all their rights in the said lands and other lands, and in the production of natural gas and hydrocarbons therefrom, and it was thereby provided that all the gross proceeds of wells drilled in the said and other lands under the said agreement were to be divided by the trust company, subject as therein mentioned, in certain defined proportions between the first and second appellants and Harding and McMullen and the second respondents. The agreement, which recited (inter alia) that the appellants desired to have the second respondents drill or have drilled wells for petroleum or natural gas on the said lands, and that Harding and McMullen had assisted in arranging for the drilling of the said wells, provided (inter alia) that on or before September 20, 1949, the second respondents would commence to drill or cause to be commenced to be drilled one well on the said lands, and would thereafter continuously and diligently carry on or cause to be carried on the work of drilling and casing such well, together with penalties in default of their doing so.

On September 26 the first respondents received from the second respondents a cheque for $3,000 which was dishonoured. They had received no other payment for work done and services rendered under the agreement of September 19.

On October 14 the first appellants served notice on the second respondents of their default under the agreement of September 24 and that, if such default was not remedied within 30 days, the said agreement should thereupon cease and determine.

On October 22 the first respondents, having applied for and received a permit from the Petroleum and Gas Conservation Board of the Province of Alberta, plugged and abandoned the said well.

Between September 23 and October 14 the first respondents did not drill the well though they were ready, willing and able to do so and would have done so had they received the payment under the agreement of September 19.

During the month of January, 1950, the well drilled by the first respondents was deepened and was subsequently completed and had produced a considerable quantity of oil. The work and services done and rendered by the first respondents were competent and skilful and for the benefit of the appellants and other respondents. The agreed value of the work done by the first respondents and the material supplied by them (not including compensation for the period from September 23 to October 16) was $30,000. The agreed value of day work was $14,075, and of material purchased by the first respondents for account of the second respondents was $1,670.62. There was no agreement between the first respondents and the appellants or any of the other respondents that the first respondents should not be entitled to a mechanics' lien under the provisions of the Act. On October 12 the first respondents filed a mechanics' lien under the Act against the said lands for the sum of $28,849.33 and on October 18 a further similar lien for the sum of $36,896.29.

On December 5, 1949, the first respondents filed their statement of claim under the Act, all the other parties to this appeal being defendants, and thereby claimed a declaration that the said liens were good, valid and subsisting liens, judgment against the second respondents for $65,745.62 and the appointment of a receiver pursuant to section 36 of the Act.

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On June 22, 1950, an order in the action was made by Shepherd J. It was made upon the application of the first appellants in the presence of the first respondents and with their assent. It recited that it appeared that a receiver should be appointed to preserve the property in the oil well therein described forming the subject-matter of that action, and to collect the receipts from the said well, and to otherwise manage and operate the said well until the settlement of the action, and it was thereby ordered that the Prudential Trust Co. should be appointed receiver to collect, get in and receive all moneys presently receivable or which might become receivable from the sale of oil or other productions from the said well, and the receiver was thereby authorised to pay out from any moneys which might be received from such sale the costs of production and of operating the well. Other directions were thereby given including a direction that the receiver (who was there called " the said trustee ") should pay out from his receipts to the respondent Szpilak the gross royalty of 12½ per cent. reserved to him under the lease, and it was ordered that, except for the payment of the said operating expenses and royalty, the receiver should pay all other moneys received thereunder into a special trust account to the credit of the action subject to further order. The said receiver duly entered upon its duties and collected the moneys receivable from the sale of oil and other products and, subject to the payments that it was directed to make thereout, paid the said moneys into a special fund to await further order. It was the destination of that fund which was the subject of the present dispute.

1959. July 7, 8, 9. *W. G. Morrow Q.C.* (Canadian Bar), *J. G. Le Quesne* and *W. A. Stevenson* (Canadian Bar) for the appellants. There are two main submissions: (1) There never was a valid lien; (2) if there ever was a lien, it was allowed to lapse, and the first respondents are not entitled to priority over the appellants. On the first point: there is no contractual basis or foundation on which the first respondents can base their claim to a lien. There is only one contract with the first respondents of September 19, 1949. The Supreme Court of Canada went substantially outside the agreed facts in reaching the conclusion they did. If this Board think that on September 10, 1949, when the drilling was commenced by the first respondents on the instructions of Harding and McMullen, someone had an interest, then on section 6 of the Act it is conceded that the appellants fail on this first point. There is, however, no evidence on the matter; everything has to be inferred. There is no evidence that Harding and McMullen purported to act on behalf of the second respondents, and it should not be inferred. This is a special statute giving special rights, and therefore must be construed strictly. Where there is a signed agreed statement of facts the court should be very careful in regard to inferences of fact, and is not entitled to infer everything in favour of one side (the first respondents here) and against the other side (the appellants), and that is what has been done by the Supreme Court.

Under section 6 of the Act it seems that the lien arises when the work is performed at the request, express or implied, of an owner, who is defined in section 2 (*g*) as a person having any "estate or interest in land." Section 43 purports to enlarge "owner" beyond persons having an estate or interest and removes the necessity for a request. Section 43 is an amendment of section 2 (*g*) and not of section 6; in other words, there is no change of section 6 by section 43. Reading sections 6, 7 and 2 (*g*) together, it is necessary that there must be *an* owner; in this case there was not an owner until after September 23. The work commenced by the first respondents on September 10 was performed for Harding and McMullen, and they had no interest in the land or oil until September 24—the date of the pooling agreement. Locke J., in his judgment in the Supreme Court of Canada, said [1]: "From these circumstances, it is proper ". . . to draw the inference that Harding and McMullen had "been authorised, either by the individual lessees from Harry "Szpilak [the third respondent] or on behalf of the Ponoka-"Calmar Company, to request the appellant [the first respon-"dents] to do the work, and further, that the drilling done by "the appellant from September 10 onward was done with the "privity and consent of the said lessees and of the said company. "Accordingly, in my opinion, a claim for a mechanics' lien came "into existence on September 10, 1949, the work was continued "under the agreement of September 19, and the appellant is "entitled to enforce such lien, not only for the work done between "September 10 and September 19, but thereafter under the "agreement with the Oil City Company [the second respondents]. "The individual lessees from Harry Szpilak and the Ponoka-"Calmar Company were owners within the meaning of that term "in sections 6 and 43 of the Mechanics' Lien Act." It is submitted that no such inference should be drawn. Rand J. cited

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[1] [1958] S.C.R.(Can.) 361, 367.

Pittsburgh Steel Products Co. v. *Huntington Masonic Temple Association*[2] in support of the view that[3]: "The effect of the "drilling agreement of September 19 was that Oil City adopted "the work done up to that time as having been done under its "provisions and no serious doubt can arise that as between the "company and Oil City, and as a result of the interest in the "proceeds acquired by Oil City under the agreement of Septem-"ber 24, the lien covering the entire work then became effective." It is submitted that Rand J. misread the *Pittsburgh* case,[4] in which there was privity with the owner—the owner was always there throughout; he joined in executing the contract. The view of Rand J. based on that case is not well founded. The first respondents never performed any work or service or furnished any materials for any "owner" within the meaning of the Act, and no lien ever arose thereunder.

On the second point—that, if there ever was a lien, it had lapsed—it is submitted that, on the facts here, the effect of section 24 (6), which requires renewal within six years, is fatal. If there was a lien here, it had lapsed before the date of the trial. In the Supreme Court of Canada the lien was treated as having expired, and there is no cross-appeal to this Board to have that part of the judgment set aside. The view of Rand J. was that the original lien, against the interests of the owners in the land on which the well was drilled, ceased on the making of Shepherd J.'s order appointing the receiver on June 22, 1950, and a new lien, against the money held by the receiver to the credit of the action, then came into existence. It is submitted that the Act does not give rise to such a series of liens, but to one lien which arises at the date of commencement of the work and, while the property against which it takes effect may change, continues to exist until it expires or is discharged under section 24 or 25 of the Act. There is no such thing as a lien on money; there is a lien on land, which is extended by a section of the Act to the oil or gas, and that is as far as it goes; but the moment it becomes money, there is no lien. A receivership does not prejudice or assist either party.

Rand J. said[5]: "The result of failure to comply with that "section [s. 24 (6)] obviously cannot affect the new and non-"registrable lien under section 26." Section 26 is not applicable here. There is no such thing as a "non-registrable lien." In no way can a receivership order affect a lien; it is merely to preserve money. The Act in fact gives rise in the case of each debt to one lien only, which is liable to expire after six years under section 24 (6), whatever may have happened during that period to the property charged. [On the receivership point reference was made to *In re Dickinson, Ex parte Charrington & Co.*[6]; *In re Potts, Ex parte Taylor*[7]; *Portman* v. *Mill*[8]; *Law* v. *Mumford*[9]; and *Power* v. *Jackson Mines Ltd.*,[10] and to Kerr on Receivers, 12th ed., p. 152.] Phillips on Mechanics' Lien, 3rd ed., pp. 138, 467 and 571, indicates the approach taken in the American courts where this type of legislation has been considered: see also *Fitzgerald and Powell* v. *Apperley and Apperley.*[11]

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[2] (1917) 94 S.E.Reptr. 127.
[3] [1958] S.C.R. 361, 369.
[4] 94 S.E.Reptr. 127.
[5] [1958] S.C.R. 361, 365.

Le Quesne following. Section 7 says that the lien shall arise at the date of the commencement of the work. The work cannot be performed for an owner unless there is an owner at the time of performance—when the work is begun. The legislature has refrained—purposely, it is submitted—from any amendment of section 6 by section 43. " For " must be given a meaning; the requirement is that the work shall be done for a person having an estate or interest, and that cannot be done if there is no person at the time satisfying that requirement. At the time the work was done it should be done for someone who had at least an indirect interest in the land or the oil. Harding and McMullen had no interest in the land or the oil on September 10. The lien is not established.

With regard to the second point, section 37 is the only provision which governs the distribution of money realised in proceedings under the Act. " Lienholders " in section 37 must be interpreted as lienholders at the date of the adjudication. Section 44, which provides that the lien provided by section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed, is extending an existing lien and not creating a new one, and Rand J. fell into error when he said[12]: " Section 24 (6) is given its full application here by " holding the lien against the land and the oil in place to have " come to an end but not the charge on the money in court." One does not have two separate liens arising. It is not therefore conceded that any sort of charge arises on any fund.

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[6] (1888) 22 Q.B.D. 187, 192; 5 T.L.R. 82.

[7] [1893] 1 Q.B. 648, 659; 9 T.L.R. 308.

[8] (1839) 8 L.J.Eq. 161.

[9] (1909) 14 B.C. 233.

[10] (1907) 13 B.C. 202.

[11] [1926] 2 W.W.R. 689, 692.

[12] [1958] S.C.R. 361, 367.

J. V. H. Milvain Q.C., *R. A. MacKimmie Q.C.* (both of the Canadian Bar), *W. Percy Grieve*, *J. H. Laycraft* (Canadian Bar) and *David Smout* (English and Canadian Bars) for the first respondents. The case has come down to two points: (1) Whether a lien was ever created; and (2) whether or not it lapsed. On the first point two general observations may be made. (1) It was said for the appellants that the Supreme Court of Canada had departed from the agreed facts and was wrong in doing so. The agreement of facts, however, in addition to having 17 points, imports with them a number of schedules, which are various agreements, and those agreements speak with just as much force and effect as do the 17 points. (2) An appellate court is in Alberta given by statute express power to draw inferences of fact.

On the first main point, an " owner " in section 6 is an owner as defined by the combined effect of section 2 (*g*) and section 43—it can be no other. The work which the first respondents did was for the benefit of the appellants, which clearly brings them within the provisions of section 43 and of section 2 (*g*). It is an irresistible inference to be drawn from all the facts that Harding and McMullen, in requesting the first respondents to do the work of drilling which began on September 10, 1949, and the second respondents in entering into the agreement of September 19, were acting as agents for the appellants. Further, or in the alternative, the effect of the drilling agreement of September 19 was that the second respondents adopted and ratified the acts of Harding and McMullen in requesting the first respondents to do the work, and the effect of the pooling agreement of September 24 was that the appellants adopted and ratified the acts of Harding and McMullen and the second respondents in requesting the first respondents to do the work. Further, the effect of the pooling agreement was to give the appellants an interest in oil from the land when severed: sections 44 and 45. On September 10 the syndicate was definitely an owner within the meaning of this statute. The inferences Locke J. drew were quite properly drawn from a combination of the 17 points of agreed facts plus the documents which came in as schedules to that agreement. Under that set of circumstances the first respondents did drill a well which was for the benefit of an owner within the extended meaning to be given to " owner " by section 43, and therefore on September 10, 1949, their lien came into being and continued. An " owner " can be a person with something less than a registered interest: *Hager* v. *United Sheet Metal Ltd.*[13]

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[13] [1954] S.C.R.(Can.) 384.

MacKimmie Q.C. following. With regard to the second point—as to the effect, if any, of section 24 (6) of the Act—the lien attached to the oil when severed and, it is submitted, it can be traced right through to the refineries. As the oil was produced, barrel by barrel, the first respondents' lien attached to each barrel and a purchaser must satisfy their claim or see that it is met. Another line was followed, however, for the appellants applied for an order for a receiver, and an order appointing one was made, presumably under section 36 of the Act, on June 22, 1950. The court could not have intended on June 22 to remove the first respondents from the framework and protection of the Act—it could not be contended for one moment that in accepting the order they were giving up anything. Their lien was good for the entire time of production. It merged in a charge on the fund in the hands of the receiver. Such charge was not vitiated, and did not fail by reason of any failure to file the statement verifying the lien under section 24 (6). The first respondents' claim against the fund in the hands of the receiver was not a lien for which registration was required under section 24. If the appellants are right, it will be contrary to the whole scheme and design of the Act and contrary to what was intended when the court made these orders.

Morrow Q.C. in reply. Someone who had an estate or interest on September 10 must be found; it is unfair, in the manner in which this case has come before the courts on an agreed set of facts—which should not be gone behind—to infer that there was a benefit to the syndicate. On the question of "owner," there is in this action a statement of claim which alleges the second respondents to be the only owners; it is unfair to infer to the extent that the Supreme Court suggests here—that the appellants are owners.

The receiving order—which it is conceded was made under the Act—was to preserve this money until the court shall order. That receiving order was never intended to change anyone's rights. The lien—assuming there to be one—continued throughout until the sixth anniversary when, under section 24 (6), it ended. It is difficult to understand that as the oil is sold the lien ceases to be a lien and becomes a charge. That is approaching it from the wrong end. The only test is, who are the subsisting lienholders on an adjudication? The onus is on the first respondents to prove that under section 37 they had a good, valid and subsisting lien.

As to costs, the Supreme Court of Canada ordered that the present first respondents should recover their costs in the Supreme

Court of Alberta and in the Supreme Court of Canada by a personal judgment against the present appellants. It is submitted that this is a proper case for some part of the costs to be taken out of the fund.

October 7. The judgment of their Lordships was delivered by Viscount Simonds. This appeal from a judgment of the Supreme Court of Canada raises questions of some difficulty upon the true construction of the Mechanics' Lien Act and, in particular, upon its application, where the lien alleged to arise under it attaches not only to certain land, including the oil and gas therein, but also to the oil and gas when severed, and where it is sought to enforce it against a fund representing the proceeds of sale of such oil and gas which have been realised by a receiver appointed by the court under the Act. Upon these questions there has been a difference of judicial opinion in the courts of Canada.

The facts can be shortly stated. They were agreed at the trial of the action, out of which this appeal arises, before the court of first instance in Alberta. What inferences can be drawn from such facts will be considered later.

[His Lordship stated the facts set out above, and continued:] It is the destination of the special fund in the hands of the receiver appointed by the court which is the subject of the present dispute, and before further examining that question it is necessary to refer in some detail to some provisions of the Mechanics' Lien Act.

For the purpose of determining the first question that appears to arise, viz., whether the first respondents validly filed a lien or liens against the said lands, only a few sections of the Act need be considered. Briefly, the question is whether the work done by the first respondents in respect of which the lien is claimed was done on behalf of any "owner, contractor or subcontractor" or of "any person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed" within the meaning of the Act, or with the privity or consent of any such owner. Section 2 defines a "contractor" as a person contracting with or employed by an owner or his agent to do work or perform services upon or in respect of, or to place or furnish materials to be used for, any improvement. "Improvement" includes a gas, oil or other well. "Owner" is defined as extending to "every person . . . having any estate or interest in land, at whose request, express or implied, and (i) upon whose credit; or (ii) upon whose behalf; or (iii) with whose privity and consent; or (iv) for whose direct benefit,—any contract work "is done and all persons claiming under him . . . whose rights are "acquired after the commencement of the work." This definition is extended by section 43 to include "every person having any "estate, interest or right in the oil or gas in place or in the oil or "gas when severed notwithstanding that such person has not "requested the contract work to be done, is only indirectly "benefited thereby and has had no dealing or contractual relation-"ship with the contractor or person claiming the lien," with the proviso that where the oil or gas is held in fee simple the holder of an interest in the first royalty in the oil or gas up to 20 per cent. thereof shall not by reason of that section be deemed to be an owner. Section 6 provides that unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making of any improvement for any owner shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used. Section 7 provides that the lien shall arise at the date of the commencement of the work or at the date of the first delivery of material. Section 19 provides for the method of registration. Section 44 provides that the lien provided under section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed, and section 45 that all interests in the oil or gas under any lease, mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to 20 per cent. shall be subject to the lien in all respects. Other sections of the Act will be referred to in connection with the other questions that arise.

Upon this first question there has been a difference of judicial opinion. The Chief Justice of the Trial Division of the Supreme Court of Alberta held that the first respondents had a valid lien for $30,000, and ordered that that sum should be paid out of the funds held by the receiver. He did not give a reasoned judgment. In the Appellate Division of the Supreme Court it was held by Ford C.J.A. and Macdonald and Porter JJ.A., that from beginning to end of the drilling the first respondents had not done any work for the owner as defined by the Act, while McBride and Johnson JJ.A. were content to assume the contrary, but for other reasons disallowed the first respondents' claim. Upon appeal to the Supreme Court of Canada the judges of that court were unanimous in determining that the first appellants were to be regarded as owners within the meaning of the Act.

In reaching this conclusion Locke J. (with whom the Chief Justice and Fauteux J. concurred) and to some extent Rand J. (with whom also the Chief Justice and Abbott J. concurred) relied on facts to some of which attention has been called, in particular that the drilling agreement of September 19 required the drilling to commence on September 10, that the agreement of September 24 specified the date for commencement as four days earlier, that Harding and McMullen were intimately connected with the appellants, and other circumstances to which reference is made in their judgment. These facts led Locke J. to infer that [1] "Harding and "McMullen had been authorised, either by the individual lessees "from Harry Szpilak [the third respondent] or on behalf of the "Ponoka-Calmar Company [the first appellant], to request the "appellant [the first respondent] to do the work, and, further, "that the drilling done by the appellant from September 10 "onwards was done with the privity and consent of the said "lessees and of the said company." This conclusion was challenged by the present appellants on the ground that such an inference of fact was not to be found in the agreed statement of facts and could not properly be drawn. If it was a fact, the first respondents should, it was said, have required the appellants to agree to its inclusion in the statement: they had not done so and it was not to be assumed that agreement would have been reached.

Their Lordships are not satisfied that the inferences drawn by Locke J. could not fairly be drawn, but they do not think it necessary to determine this question. For in the judgment of Rand J. there is what appears to them an alternative and decisive way of dealing with the question. That judge, after citing section 43 of the Act, proceeded [2]: "The drilling work prior to "the date of the contract [i.e., the 19th September] having been "expressly contemplated in the agreement of September 24th, "these two companies [i.e., the present appellants] vis-à-vis Oil "City [the second respondent] have ratified and bound them-"selves to the latter's recognition and inclusion of the work done "previously to the 15th. Section 43 in its exceptional terms was "undoubtedly passed to meet just such situations as are shown "here: i.e., conditions brought about by the urgency to exploit "the resource in which formal agreements could not keep pace

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[1] [1958] S.C.R.(Can.) 376.

[2] Ibid. 369.

"with action and only by relation back were the rights of the "parties intended to be determined." In his opinion, therefore, the appellants clearly were "owners" within section 2 and section 6 as extended by section 43. Their Lordships agree with this statement, which no elaboration can improve. This question must therefore be decided in favour of the first respondents.

It remains to determine whether upon the assumption that valid liens were created in favour of the first respondents they were enforceable in the manner and to the extent directed by McLaurin C.J. The consideration of this question requires the statement of other sections of the Act.

Section 19 and the following sections prescribe the manner in which, and the time within which, liens must be registered. Section 24 provides for the expiry and discharge of a lien and must, in view of the opinion of McBride and Johnson JJ.A. in the Appellate Division of the Supreme Court of Alberta and of the contention before the Board, be stated in some detail. By subsection (1) it is enacted that every lien which is not registered shall absolutely cease to exist on the expiration of the time thereinbefore limited for the registration thereof. Subsection (2) provides for the cessation of a lien upon notice. Subsection (6) is more relevant. It provides that every registered lien, whether a certificate of lis pendens has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of the lien unless before the expiration of that period, and not more than two months before its expiration, the lienholder, his assignee, agent or any person claiming through or under him, files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing to him for principal and interest, which statement might be in Form 7 in the Schedule, or to the like effect, with such variations as the circumstances might require.

Section 26 is significant. It provides: (1) that upon application by originating notice a judge having jurisdiction may allow security for, or payment into court of, the amount of the claim and such costs as he may think fit, and may thereupon order that the registration of the lien be vacated, and (2) that any money paid into court shall take the place of the property discharged, and be subject to the claim of all persons for liens to the same extent as if the money was realised by a sale of the property in an action to enforce the lien.

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Sections 30 to 37 deal elaborately with the enforcement of a claim for a lien. Proceedings to enforce a lien may be commenced either (as in the present case) by a statement of claim or by originating notice, and in either case by the filing of lis pendens in the prescribed form. Service of the claim or notice is to be made upon all persons who by the records of the Land Titles office appear to have any interest in the land in question, and such other person as the judge may direct. All lienholders served with the statement of claim or notice are to be deemed parties to the proceedings, and any lienholder failing to appear at the hearing after proof of notice duly served on him thereby loses his lien. Section 35 provides that upon the hearing of the application the judge shall decide all questions which arise therein, or which are necessary to be tried in order to completely dispose of the action, and to adjust the rights and liabilities of all persons concerned. He may (inter alia) order that the land charged with the lien be sold and, when a sale is held, must direct to whom the money in court shall be paid, and where a claimant fails to establish a valid lien may make a personal order against any party to the proceedings for such sum as may appear to be due to him and which he might recover in an action against such party.

By section 36 the judge is empowered at any time prior to the sale of the property, upon the application of any lienholder, to appoint a receiver to take charge of the property and rent it on such terms and conditions as he thinks fit, and after making such deductions as thereby prescribed, to apply the balance of the rents as directed by the judge. By section 47 (where the improvement consisted of an oil or gas well) the judge might, in appointing a receiver under section 36, authorise him to take charge of the well and operate it and sell the production therefrom or, in the alternative, to take the oil and gas when produced and saved and sell the same and receive and pay into court the proceeds of the gas and oil when sold.

Finally, it was by section 37 (1) provided that all moneys realised by proceedings under the Act, including as therein mentioned, should be applied and distributed in the following order, that is to say, in paying (a) the costs of all lienholders of and incidental to the proceedings, and of registering and proving the liens, (b) six weeks' wages (if so much be owing) of all labourers employed by the owner, contractor or sub-contractor, (c) the several amounts owing to other lienholders other than the contractor, (d) the amount owing to the contractor: subsection (2) provided for the methods of distribution between the lienholders inter se, and subsection (3) for the payment of the balance to the owners or other persons legally entitled thereto.

Their Lordships can now deal with the contention which found favour with two of the judges of the Appellate Division of the Supreme Court of Alberta, viz., that the two liens which had been registered on October 12 and 19, 1949, absolutely ceased to exist on October 13 and 20, 1955, by virtue of section 24 (6) of the Act, and that the lienholders had no longer any rights by virtue of their liens against the fund representing the proceeds of sale of the oil. Upon this question their Lordships are so fully in agreement with the judgment given by Rand J. in the Supreme Court of Canada that they can state their own opinion shortly.

The object of a mechanics' lien is to give a security to those who have by work or services effected an improvement upon land by way of a charge upon that land. Its registration is for the purpose of protecting the title to an estate or interest in land which is created by the lien. It is thus part of the law affecting title to land, as the prescribed form of claim for registration clearly indicates. The extension of the lien by section 44 from the land " including the oil and gas therein " to the oil and gas when severed, creates a new situation. It is not necessary to consider what are the rights of the parties so long as the oil and gas, though severed, remain on the land. That is not the position here. The relevant question is what are their rights when the oil and gas, formerly subject to the lien, pass into the hands of a receiver appointed by the court, and are sold by him and the proceeds paid into a fund to await the further order of the court. In the first place, it is clear that the original lien can no longer subsist: it is equally clear in the second place, that there is no longer anything, so far as the oil and gas thus sold are concerned, in respect of which a new lien can be registered or an old lien renewed. But from this it does not follow that the lienholders have no rights against the fund representing the proceeds of sale. It may not be correct to say that a new charge against the fund is substituted for the old lien—though the language of section 26 (2) goes far to justify it. But this is a matter of words. The scheme of the Act is that, where land subject to a lien is sold in an action to enforce a claim, the lienholder is not to be prejudiced by the fact of sale and, subject always to prior claims, which may now include the costs and expenses arising out of the action, has the same rights as he would have had against the land itself, including the oil and gas whether severed or not.

It may be pointed out that, if it were otherwise, the action

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of the lienholder in obtaining the appointment of a receiver with a view to the preservation of the property subject to the lien, would or might result in the loss of the rights which the lien was intended to preserve. In the present case it appears that the application for a receiver was made not by the lienholder but by the owner. But it was made with the consent of the former, and it is not to be supposed that his rights were thereby prejudiced. The appointment is contemplated by the Act as being made, and was in fact made, in an action by the lienholder to enforce his claim, and is part of the statutory machinery for doing so.

It further appears to their Lordships that any doubt that might otherwise exist is set at rest by the provisions of section 37 of the Act, which provides for the application of moneys " realised " by proceedings under this Act." It is clear that the moneys paid into court or into a special fund by the receiver are moneys " realised by proceedings under this Act." If so, they must be applied and distributed in the prescribed order to the persons therein named. But it was urged that the lienholders therein mentioned meant only those persons who had subsisting liens on the land at the date of distribution. This contention cannot be accepted. For the land subject to the lien had been sold and under section 26 (2) the lienholder was relegated to the claim to a lien " to the same extent as if the money was realised by a sale " of the property in an action to enforce the claim." It follows that the lienholders mentioned in section 37 are those persons who had at the time of sale a lien on the property sold and brought their action to enforce it. The only consistent interpretation of the Act is to treat the proceeds of sale of oil and gas realised by the receiver in the same way as the proceeds of sale of the land itself. This may be described as creating a charge on the fund: but equally it is the method which a court administering a fund under its control must employ in order to preserve and give effect to the rights of the parties, and it is that principle that is embodied in section 37.

For these reasons, their Lordships are of opinion that the judgment of the Supreme Court of Canada was correct. They will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Charles Russell & Co.; Lawrence Jones & Co.*

C. C.

J. C.*

1959
Nov. 12.

GEORGE N. HOURY . . . . . APPELLANT;

AND

COMMISSIONER OF INCOME TAX . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Revenue—Surtax—Company—Apportionment following surtax direction—Effect—Settlement of shares on child by father—Notional distribution of dividend—Whether assessable as income of father—Meaning of "deemed"—East African Income Tax (Management) Act, 1952, *ss.* 22, 24.

Revenue — Income tax — Child — Settlement by settlor on — Company shares—Surtax direction—Whether child's income to be regarded as income of settlor for that purpose.

Eastern Africa—Tanganyika.

By section 22 of the East African Income Tax (Management) Act, 1952, the undistributed portion of the total income of certain companies, subject to a limit of 60 per cent. of such income, is deemed to have been distributed as dividend amongst the shareholders of the company if the Commissioner of Income Tax makes an order to that effect, and "the proportionate share thereof of "each shareholder shall be included in the total income of such "shareholder for the purposes of this Act."

Section 24 provides: "(1) Where, by virtue or in consequence "of any settlement to which this section applies and during the "life of the settlor, any income is paid to or for the benefit of a "child of the settlor in any year of income, the income shall be "treated for all the purposes of this Act as the income of the "settlor for that year and not as the income of any other person."

The appellant, his wife and his two infant children each held a number of shares in a company registered in Tanganyika, the children's shares having been transferred into their names by their father, the transfer constituting a "settlement" within the meaning of section 24 of the Act of 1952. The Commissioner of Income Tax having made an order under section 22 of the Act that 60 per cent. of the company's income for two specified years should be deemed to have been distributed amongst its shareholders, the appellant was assessed on the basis that under section 24 the sums deemed to have been received by his children upon the distribution were in the respective years to be treated as part of his income for tax purposes:—

Held, that section 22 and section 24 were independent charging provisions and the charges which they imposed were mutually exclusive; the two sections could not be read as part of a coordinated scheme in which the provisions of one reflected upon and adopted the provisions of the other. The income "paid" within the meaning of section 24 and as such attributed to the father could not include income deemed to be distributed by virtue of section 22 and as such attributed to the children, and accordingly the notional dividends attributed to the children were not within the charge of section 24 and could not be treated as the income of the father.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 27 of 1958) from a judgment of the Court of Appeal for Eastern Africa (April 2, 1958), dismissing the present appellant's appeal from a judgment of the High Court of Tanganyika (November 12, 1956), which had dismissed his appeal against additional assessments to income tax for the years of income 1951 and 1952.

The following facts are taken substantially from the judgment of the Judicial Committee: In the Coastal Freights & Co. Ltd., a company registered in Tanganyika with a share capital of Shs.500,000 divided into 500 shares of Shs.1,000 each, the appellant, George N. Houry Q.C., held 251 shares, his wife 49 and his two infant children 100 each. The children's holdings were transferred into their names by their father, the transfer constituting a "settlement" within the meaning of section 24 of the East African Income Tax (Management) Act, 1952.

On November 17, 1954, the respondent, the Commissioner of Income Tax, made an order under section 22 that 60 per cent. of the company's income for the periods ending December 31, 1950, and December 31, 1951, respectively, should be deemed to have been distributed among its shareholders, with the result that each child was deemed to have received Shs.44,162 in respect of the first year and Shs.33,568 in respect of the second.

Assessments were then made upon the appellant on the basis that under section 24 those sums were to be treated as part of his income. The actual assessments involved were in the sum of Shs.104,304 for the year of income 1951 and Shs.72,900 for the year of income 1952, the difference being due to the sums attributable to him in respect of his own shareholding. No challenge was made to the assessments so far as they related to those last sums.

The appellant appealed against the assessments so far as they related to the "dividends" on the children's shares. The course that the case had taken hitherto was that the respondent refused to amend the assessments: on appeal, the High Court of Tanganyika (Lowe J.) confirmed them; and on April 2, 1958, the

Court of Appeal for Eastern Africa (O'Connor P., Forbes J. A. and Macduff J.) dismissed his appeal from the High Court.

1959. Oct. 21, 22. *Roy Borneman Q.C.*, *P. J. Brennan* and *M. Heald* for the appellant. The statutory provisions in question—sections 22 and 24 of the East African Income Tax (Management) Act, 1952—are modelled, with modifications, on similar provisions in the United Kingdom legislation. It is submitted that: (1) dividends deemed to have been distributed pursuant to an order under section 22 are not in fact "paid," and cannot be assessed on the basis that they were in fact paid to or for the benefit of the child within the meaning of section 24; (2) a notional dividend deemed to have been distributed pursuant to the order of the commissioner under section 22 cannot be money paid by virtue or in consequence of the settlement within the meaning of section 24. Subsection (1) of section 24 must be looked at in its context with the other subsections, and there is no doubt that the legislature has very carefully considered what the scope of section 24 shall be. No income for the purposes of the Act has in fact been paid. Section 24 is not connected with or tied to section 22 in any way, and they cannot be married together; they are separated by the very wide-sweeping section 23. There is no reference to section 22 in section 24 and vice versa; they were not introduced into the Statute Book together. There appears to be no instance in the authorities of the creation of a liability to tax in this way. This Act did not do it, and taking the sections as they stand the commissioner cannot use them in the way he is seeking to do. Reliance is not placed on a textual comparison with the United Kingdom legislation. To support his view the commissioner needs other words in section 24 (1)—"is paid or is deemed to have been paid"—and they are not there. If the legislature had wished to go outside the simple, ordinary meaning of "paid" it could have done so by using "deemed" in section 24 (1). In that subsection "paid" means physically paid—an actual physical payment. The whole background of section 24 is the physical receipt of income. Had the legislature intended notional income, whether arising under section 22 or any other section, to be brought in under section 24 (1), it would have said so clearly. Section 22 does not say that it shall be deemed to have been distributed among "and "paid to" the shareholders. Nowhere in this Act does "paid" mean other than what it says—physically and in fact; where it is otherwise it says so: section 24 (2), where the words "shall be "deemed to be paid to" are used. If the words in section 24 (1) are to be read as "is paid or is deemed to have been paid," then subsection (4) of section 24 would have to be enlarged to deal with that situation. None of the authorities assists one way or the other; it is a pure matter of construction.

If the above argument be wrong, it is submitted, secondly, that this income is not shown to have been paid or deemed to have been paid "by virtue or in consequence of" the settlement. Here it results not from the terms of the settlement but from the order of the commissioner; the act of the commissioner in bringing forward this notional income from section 22 is the mainspring whereby this income is deemed to be paid and no other. This liability arises, and arises directly, by virtue and directly in consequence of the commissioner's action.

Brennan, following, referred to *Inland Revenue Commissioners* v. *Prince-Smith.*[1] Sections 22 and 24 are separate and distinct sections, not to be mixed together, and they were enacted for specific and separate purposes, at different times, and each is complete in itself.

F. N. Bucher Q.C. and *Roderick Watson* for the respondent. The answer to the first proposition for the appellant is that the fact that the Act deems dividends to have been distributed necessarily involves the inference that such dividends are deemed by the Act to have been paid to the shareholders. And the answer to the appellant's second submission is that once the position has been reached that the dividends have by force of the Act been paid, it can only be by virtue or in consequence of the gift of the shares to the child that they—the dividends—have been paid to the child. *Inland Revenue Commissioners* v. *Countess of Kenmare* [2] shows that the fact that the machinery may not be effective to carry out the design of imposing the burden of the tax on the taxpayer who enjoys the income is not a ground for limiting the charging words. The person who enjoys the undistributed profits has to pay the tax. Subsection (4) of section 22 enables the tax to be recovered from the company. Subsection (4) of section 24 would give relief to the father. There is no clear indication that this difficulty about machinery should be a bar to the Crown's claim.

The Act recognises that notional distribution of dividend necessarily involves notional payment. Section 22 (1) and section

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[1] (1943) 25 T.C. 84; [1943] 1 All E.R. 434.

[2] [1958] A.C. 267; [1957] 3 W.L.R. 461; [1957] 3 All E.R. 33; 37 T.C. 383.

24 (1) are marching along side by side. Even though the father is not treated as a shareholder he can through his child procure the company to pay the tax appropriate to that notional share of income. It could be in the interests of the child to procure the company to pay. Section 24 in terms compels one to regard the father as a shareholder. That section, in the case of a real dividend, requires the father to be put into the position of a shareholder. That being so, there is no added difficulty in putting him in the place of a shareholder in the case of a notional dividend under section 22. It is no great stretch—where income which exists is deemed to have been paid to a person who does not receive it—to say that the receiver of deemed income is a deemed shareholder; it is all rather Alice in Wonderland! It is not unusual for the legislature to provide that the tax shall be levied on a person who has not got the income.

In section 24 it is not necessary for the word " paid " to mean payment in cash; an allocation is enough; it has been said that " paid " must take its meaning from its context. When a dividend is distributed, it is necessarily paid, and the legislature has recognised that in section 22. Subsection (6) of section 22 links the word " paid " directly with the words of subsection (1), and is a definition. There are equally unsatisfactory difficulties on the construction put forward on behalf of the taxpayer. One comes back to saying that section 22 must be treated as an allocation section, and that the deemed provision does necessarily involve payment of the dividends for all the purposes of the Act, and that, reading section 24, this income has been paid to the child.

Borneman Q.C. in reply. Sections 22 and 24 are not marriable to give the Crown the result it seeks. The words are simple and only become complicated when the Crown seeks to put a gloss on them. There is no indication anywhere in the words used by the legislature or in any implication from them that the father is to be treated as a shareholder; nor is he to be deemed one for all the purposes of the Act. The present is a case where the principle referred to by Viscount Simon in *Russell (Inspector of Taxes)* v. *Scott* [3] should be reasserted: " . . . the language of " the rule is so obscure and so difficult to expound with confidence " that . . . I feel that the taxpayer is entitled to demand that " his liability to a higher charge should be made out with reason- " able clearness before he is adversely affected. In the present " instance, this reasonable clearness is wanting."

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[3] [1948] A.C. 422, 433; 64 T.L.R. 297; [1948] 2 All E.R. 1.

November 12. The judgment of their Lordships was delivered by LORD RADCLIFFE. The East African Income Tax (Management) Act, 1952, which it will be convenient to refer to as the Income Tax Act, contains two sections, section 22 and section 24, the effect of each of which is to attribute to a person income as paid to or received by him despite the fact that no such income has actually been paid or received. Each section has its analogue in the taxing code of the United Kingdom; their purpose is by a fiction to place in the hands of a taxpayer income which, though not his in the eyes of the law, is thought to be fairly attributable to him in the measurement of his taxable capacity. By the first, section 22, the undistributed portion of the total income of certain companies, subject to a limit of 60 per cent. of such income, is deemed to have been distributed as dividend among the shareholders of the company, if the Commissioner of Income Tax makes an order to that effect, and the proportionate share of each shareholder is then to be included in his own total income. The second, section 24, requires that any income which by virtue of a settlement is paid to or for the benefit of a child of the maker of that settlement during the infancy of the child shall be treated as the income of the settlor for the purposes of the Act and not as the income of any other person.

The short question raised by this appeal is whether the dividend which is deemed to have been paid under section 22, when an order affecting the company comes into operation, is to be reckoned as a payment of income to or for the benefit of a child shareholder when the computation of a settlor's income is made for the purposes of section 24. Another way of putting the question is to ask whether the notional payment that is effected under section 22 amounts to a "payment" for all the purposes of the different sections of the Act, or at least of section 24; or whether the fiction that it sets up is for the purposes of section 22 alone and is confined in its operation to that section 22 and the resulting assessment.

The facts upon which this question arises are simple. [His Lordship stated the facts as set out above and continued:] It is now for their Lordships to express their opinion upon the issue involved. The words of section 24 (1) that are to be construed run as follows: "Where, by virtue or in consequence of any "settlement to which this section applies and during the life of "the settlor, any income is paid to or for the benefit of a child "of the settlor in any year of income, the income shall be treated "for all the purposes of this Act as the income of the settlor for "that year and not as the income of any other person." With regard to the ambit of these words it is, of course, apparent that in the present case no income has in fact been paid to or for the benefit of a child. No payment has been made at all. All that has happened is that a fictitious payment of dividend has been brought about by the operation of the order made under section 22. Unless, therefore, the effect of such an order is to impose upon the meaning of the word "paid" in section 24 an interpretation which includes sums deemed to have been paid by virtue and for the purposes of another section of the Act, these notional dividends attributed to the children are not within the charge of section 24 and cannot be treated as the income of the father.

In the High Court a solution of the difficulty was found by reference to the special provisions of section 24 (2) (*a*). This construction of the subsection was not adopted by the Court of Appeal and was not relied upon in argument before the Board. Their Lordships do not therefore refer to it further except to say that they would not find it maintainable. The point of view that commended itself to the Court of Appeal, on the other hand, was in substance that since the order under section 22 had the effect of bringing about a notional payment of dividend and attribution of income to the children for the purposes of the Act, that statutory fiction of a payment having taken place ought to be carried through and applied in any other part or section of the Act in which a payment to the children was referred to. The argument is stated cogently and persuasively in the judgment of Forbes J.A., who delivered the opinion of the court. In effect, it treats the provision in section 22, which requires the assumption of a fictitious payment in order to impose the charge created by that section, as if it set up an interpretation of the general meaning of the word "paid" throughout the body of the Act.

Their Lordships do not think that section 22 can be treated in this way or that the Income Tax Act is so constructed as to allow the assumptions of section 22 to be imported into the operation of section 24. The two sections are independent charging provisions and the charges which they impose are mutually exclusive. If the relevant words of section 22 (1) are set out, it will be seen that they run as follows: "the undistributed portion of "sixty per cent. of such total income of the company for that "period shall be deemed to have been distributed as dividends "amongst the shareholders . . . and thereupon the proportionate "share thereof of each shareholder shall be included in the total "income of such shareholder for the purposes of this Act." It is not merely that there is to be a notional payment of dividend; it is also that each shareholder's share of the dividend is to be included in his total income for the purposes of the Act. The dividend then must go into the total income of the child who owns the shares, and for the purpose of taxation it is to be treated as his income. Such an enactment would be blankly inconsistent with the enactment contained in section 24 that whatever is paid to or for the benefit of a child is to be treated for all the purposes of the Act as the income of the father and not as the income of any other person if " paid " in this section were to include what is deemed to be paid by the earlier section. It appears to their Lordships to be the unavoidable conclusion that in construing section 24 the income " paid " within the meaning of that section and as such attributed to the father cannot include income deemed to be distributed by virtue of section 22 and as such attributed to the child.

It is natural to look to the other provisions of the respective sections to see if they throw any light upon the meaning to be given to the word " paid " in section 24. So far as they go, they favour a construction of that word that does not extend it beyond actual payments that have reached the child or its trustee. Subsection (4) of section 24, for instance, gives a settlor who has paid tax on the income attributed to him a right to recover the amount of the tax from the " trustee or other person to whom " the income is payable " under the settlement. There is nothing surprising in this right of recoupment so long as it does not extend beyond cases where an actual payment of income has been made. It would be a very surprising thing, on the other hand, to find provision for this right to be asserted against a trustee or beneficiary who had never had any money at all in his hands and, for all that appears, might never at any time receive any distribution on his shares except the fictional one introduced by section 22. Again, section 22 (4), which gives a shareholder the right to require the company to pay his tax to the commissioner, where no actual distribution has taken place, operates only when " the " proportionate share of any shareholder . . . in the undistributed " profits . . . has been included in his total income." This is not just a piece of machinery; some such right as this is an important part of any scheme which taxes persons in respect of income which they have never had and may have no power to obtain. Yet it is impossible to find any acceptable explanation of the manner in which this subsection could be made to work if the respondent's argument is right, since (*a*) the proportionate share

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would not have been included in the total income of the child, but of the father, and (*b*) the child is, but the father is not, the shareholder in the company.

It is fair to recognise that the appellant's argument is itself capable of producing anomalies in the relation between the charges imposed by the two sections. But the effect of them is only to drive home the point which has appeared from the considerations adduced above, that the two sections cannot be read as part of a co-ordinated scheme in which the provisions of one reflect upon and adopt the provisions of the other. They do not in fact harmonise as they stand; if they are to be harmonised, it must be by new enactment of the legislature in which the various complications of their inter-relation can be foreseen and specifically provided for.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the order of the Court of Appeal for Eastern Africa dated April 2, 1958, and the order of the High Court of Tanganyika dated November 12, 1956, be set aside and that the respondent be ordered to pay the appellant's costs of those two hearings; and that the assessments T, 1234 and 3718 which are under appeal should be remitted to the respondent with directions to amend them in accordance with their Lordships' opinion here expressed. The respondent must pay the costs of the appellant of this appeal.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.; Charles Russell & Co.*

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SHEIK MOHAMED BASHIR . . . . APPELLANT;

AND

COMMISSIONER OF LANDS . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Lease of Crown land—"Special conditions"—Breach—Whether "covenants" or "conditions of defeasance"—Relief from forfeiture—Jurisdiction of court—Principles applicable in granting

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* *Present*: LORD COHEN, LORD DENNING and LORD JENKINS.

relief—Crown Lands Ordinance, 1915 (*Laws of Kenya*, 1948 *Rev.*, *c.* 155), *s.* 83—*Registration of Titles Ordinance*, 1919 (*Laws of Kenya*, 1948 *Rev.*, *c.* 160), *ss.* 20, 21; *Sch. I, form B* (1).
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Section 83 of the Crown Lands Ordinance, 1915, of Kenya, provides: " . . . if there shall be any breach of the lessee's covenants . . . " the Commissioner may serve a notice upon the lessee specify- " ing . . . the covenant of which a breach has been committed, " and . . . may commence an action in the Supreme Court for the " recovery of the premises, and, on proof of the facts, the Supreme " Court shall, subject to relief upon such terms as may appear " just declare the lease forfeited. . . .

" In exercising the power of granting relief against forfeiture " under this section the court shall be guided by the principles of " English law and the doctrines of equity."

By a Crown grant of January 8, 1953, operating as a lease made, not as a deed inter partes but as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance, 1919, of Kenya, a town plot in Nairobi was granted to the appellant for a term of 99 years subject to the provisions of the Crown Lands Ordinance, 1915, and to a number of "special conditions" set out in the grant, the first of which provided that the appellant should erect within 36 months an hotel at a specified cost and in compliance with particularised specifications, the other "special conditions" being expressed for the most part in such a way as to impose an imperative obligation on the appellant to perform and observe them. The appellant having erected no buildings on the plot within the prescribed time the respondent, the Commissioner of Lands, claimed possession of the plot on the ground that the stipulation in the first of the special conditions was a "condition" of the lease the non-fulfilment of which entitled him to treat the lease as avoided. The appellant contended that the special conditions were "covenants" and claimed, inter alia, that in the circumstances he should be granted relief from forfeiture under section 83 of the Ordinance of 1915:—

Held, that on construction and in light of the relevant legislation, the special conditions set out in the grant would have constituted covenants within the meaning of section 83 of the Crown Lands Ordinance, 1915—as distinct from and contrasted with conditions of defeasance—in a lease inter partes under that Ordinance, and that the special conditions were equally covenants when included, as here, in a grant operating as a lease but made as a deed poll in form B (1) prescribed by the Registration of Titles Ordinance, 1919, which, by section 20, provided that all land comprised in any grant issued after the coming into force of that Ordinance should be subject to it. The court, accordingly, had jurisdiction to grant relief from forfeiture under section 83 of the Ordinance of 1915 (post, p. 61).

Even assuming that the special conditions could be regarded as possessing the dual character of covenants and conditions, a stipulation of that combined character would nevertheless be a covenant

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within the meaning of section 83, and the remedy by way of forfeiture (subject to relief) conferred by that section would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question (post, p. 60).

The effect of the second paragraph of section 83 is that where a case for forfeiture has been made out the court, in determining whether and on what terms relief should be granted, is to be guided by the principles on which the English courts exercised their power under the English statute law in force at the date when the Ordinance came into operation, and by the doctrines of equity; that means that the court is to be guided (not necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of English courts thereunder so far as applicable to a case under section 83, and by the doctrines of equity (post, pp. 61–62).

Dedhar v. *Commissioner of Lands* [1957] E.A.C.A. 104 approved.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 17 of 1959) from a judgment of the Court of Appeal for Eastern Africa (March 24, 1958) allowing an appeal by the present respondent, the Commissioner of Lands, from a judgment of the Supreme Court of Kenya (March 4, 1957) whereby the present appellant, Sheik Mohamed Bashir, was granted, upon conditions, relief from forfeiture to the respondent of certain land in Nairobi which was leased to him by Crown grant.

The following facts are taken from the judgment of the Judicial Committee: This case concerned a Crown grant dated January 8, 1953, and made by the Governor of Kenya (acting by the respondent Commissioner of Lands), whereby a town plot in Nairobi was granted by the Governor to the appellant, Sheik Mohamed Bashir, for the term of 99 years from September 1, 1952, subject to the progressive rent therein mentioned, and subject also to the provisions of the Crown Lands Ordinance (Chap. 155), and to a number of stipulations referred to in the grant as, and therein set out under the heading of, " Special Conditions."

The " Special Conditions " comprised 12 numbered paragraphs of which the first was in these terms: " 1. The grantee shall erect " complete for occupation within thirty-six months of the commencement of the term an hotel building of approved design " on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved " by the Commissioner of Lands and shall maintain the same " (including the external paintwork) in good and substantial " tenantable repair and condition. The building shall be of at " least six storeys and the cost of construction shall be at least " shillings seven million."

The grant was made by the Governor in exercise of his powers under the Crown Lands Ordinance of 1915 (Chap. 155), and was in the form prescribed for a Crown grant of land for a term of years by section 21 of and form B (1) in the First Schedule to the Registration of Titles Ordinance of 1919 (Chap. 160). The form so prescribed was that of a deed poll as distinct from a deed inter partes, but it was not now disputed that, albeit made in that form and executed only by the Governor and not by the appellant, the grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant Ordinances applicable to such leases.

The appellant admittedly failed to erect any buildings on the plot within the period of 36 months prescribed by paragraph 1 of the "Special Conditions," and founding himself on that default the commissioner by a plaint dated November 16, 1955, began the present proceedings claiming (in effect) possession of the plot and mesne profits on the ground that the stipulation contained in paragraph 1 of the special conditions was a condition of the lease constituted by the grant, the non-fulfilment of which entitled him to treat the lease as avoided; or alternatively, in case it should be held contrary to his contention that the stipulation in question was a covenant as distinct from a condition, a declaration of forfeiture of the lease and damages for breach of covenant.

By his defence, the appellant admitted the alleged breach of covenant, but contended that the "Special Conditions" were, and were to be construed as, covenants. He alleged various facts and circumstances on which he relied as disqualifying the commissioner from claiming forfeiture (a contention not now maintained) and claimed that the action should be dismissed or, alternatively, that he should be granted relief under section 83.

Rudd J., who tried the case at first instance in the Supreme Court of Kenya, held (by a judgment dated March 4, 1957) that the "Special Conditions" were covenants within the meaning of section 83, and accordingly, that he had jurisdiction to grant relief under that section, which (by a decree dated May 2, 1957) he proceeded to do.

On appeal by the commissioner to the Court of Appeal for Eastern Africa (Sir Kenneth O'Connor P., Sir Ronald Sinclair C.J. (Kenya) and Forbes J.A.), that court by an order dated March 24, 1958, allowed the appeal, set aside Rudd J.'s decree of May 2, 1957, and substituted therefor a declaration that the title of the appellant to the land in question had been extinguished as from November 16, 1955 (the date of the plaint), with consequential directions as to possession and mesne profits.

From that order of the Court of Appeal for Eastern Africa the appellant now appealed to this Board.

1959. Oct. 21, 22. *Dingle Foot Q.C.*, *Swaraj Singh* and *J. R. Bisschop* for the appellant. Both courts below rightly held that the grant was a lease within the meaning of section 83 of Crown Lands Ordinance, 1915, and the trial judge was right in holding that the special condition as to building should be construed as being a covenant within the meaning of that section. The trial judge had jurisdiction under section 83 to relieve against forfeiture. The general policy of the law has been to enlarge the original doctrine of equity and to give the courts unfettered discretion to relieve against forfeiture. The Registration of Titles Ordinance, 1919, did not change the substantive rights of Crown lessees, and it would be a retrograde step if that Ordinance had restricted a right to relief which was granted in the Ordinance of 1915. Examination of the two Ordinances shows that the building stipulation in the appellant's lease is to be construed as a covenant. The words "condition" and "covenant" are not used as terms of art in either Ordinance. The Ordinance of 1915 is a complete code governing Crown land. Assuming that it intended to give relief from forfeiture for breach of stipulations in leases, it would be remarkable if this should be taken away completely because of the wording of a form in a Schedule to a procedure Ordinance—the Ordinance of 1919. An intention to take away the power of relief would have been expressed in clear terms. Even under the pure doctrines of equity, relief should be granted in this case. The Court of Appeal erred in holding that *Dedhar* v. *Commissioner of Lands*[1] did not bind them. [Reference was also made to *Hyman* v. *Rose*,[2] *Murugiah* v. *Jainudeen*,[3] *Eaton* v. *Lyon*[4] and *Hill* v. *Barclay*.[5]]

Geoffrey Cross Q.C., *J. G. Le Quesne* and *H. G. Sherrin* for the respondent. Building provisions in a Crown lease are in a different position from other stipulations. They were covenants under the Ordinance of 1902, but were made into conditions by the Ordinance of 1915. There is a notable change of language between the two Ordinances. Under the 1915 Ordinance it was proper, indeed obligatory, to express building provisions in a lease as conditions. Although "condition" is not always used in a technical sense in the Ordinance of 1915, that enactment does draw a distinction between covenants and conditions. The Governor can extend the time for performing a building condition, but the court cannot grant relief from the consequences of its breach. The appellant's lease ended as soon as the landlord took advantage of the breach of the building condition. The effect of the Ordinance of 1919 on all covenants was to make them into special conditions, and the building provision then ceases to be different from any others. The Court of Appeal were right in declining to regard *Dedhar's* case [6] as a binding authority on the applicability of section 83 of the Ordinance of 1915 and in considering that point de novo. On the issue of the old doctrines of equity, it is submitted that a Vice-Chancellor in Victorian times would not have given relief in this case. If, contrary to the submission for the respondent, it should be held that the court had jurisdiction to grant relief in this case under the general doctrines of equity unaffected by statutory enlargement, then it is submitted that no ground justifying such relief was shown by the appellant. [Reference was made to *Barrow* v. *Isaacs & Son* [7] and *Bargent* v. *Thomson*.[8]]

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[1] [1957] E.A.C.A. 104.

[2] [1912] A.C. 623; 28 T.L.R. 432.

[3] [1955] A.C. 145; [1954] 3 W.L.R. 682.

[4] (1798) 3 Ves.Jun. 689.

[5] (1811) 18 Ves.Jun. 56.

Sherrin following. By changing the form of Crown leases to unilateral grants the Registration of Titles Ordinance of 1919, although it may not have been intended to have this effect, unavoidably made it impossible for there to be any covenants by the grantee. The draftsman of the Ordinance of 1919 restored an ancient type of grant. [*Dedhar's* case [9] and *In re Brain* [10] were referred to.]

Foot Q.C. replied and referred to *Rex* v. *Chapman*.[11]

December 1. The judgment of their Lordships was delivered by Lord Jenkins, who stated the facts set out above and continued: In order to appreciate the materiality of the distinction between the commissioner's alternative claims, it is necessary to consider section 83 of the Crown Lands Ordinance. That section provides as follows: "83. If the rent or royalties or any part "thereof reserved in a lease under this Ordinance shall at any

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[6] [1957] E.A.C.A. 104.

[7] [1891] 1 Q.B. 417; 7 T.L.R. 175.

[8] (1864) 4 Giff. 473.

[9] [1957] E.A.C.A. 104.

[10] (1874) 44 L.J.Eq. 103.

[11] [1931] 2 K.B. 606; 47 T.L.R. 620.

"time be unpaid for the space of thirty days after the same has "become due, or if there shall be any breach of the lessee's covenants, whether express or implied by virtue of this Ordinance, "the Commissioner may serve a notice upon the lessee specifying "the rent or royalties in arrear or the covenant of which a breach "has been committed, and at any time after one month from the "service of the notice may commence an action in the Supreme "Court for the recovery of the premises, and, on proof of the "facts, the Supreme Court shall, subject to relief upon such "terms as may appear just, declare the lease forfeited, and the "Commissioner may re-enter upon the land.

"In exercising the power of granting relief against forfeiture "under this section the court shall be guided by the principles of "English law and the doctrines of equity."

It will be seen that if the stipulation contained in paragraph 1 of the special conditions was a covenant within the meaning of this section, it was open to the commissioner at any time after one month from the service of the prescribed notice (which he had in fact served on September 29, 1955), to take proceedings under this section for a declaration of forfeiture of the lease; but that if he took that course his claim was liable to be defeated by a successful prayer for relief on the part of the appellant. It will be seen further that on the footing that the stipulation in question was a covenant within the meaning of section 83, it was only by invoking that section that the commissioner could assert a claim to forfeiture for its breach.

On the other hand, if the commissioner could succeed in making good his primary contention that the stipulation in question was a condition, as distinct from a covenant within the meaning of section 83, he was in a far stronger position. He had then no need to ask the court for a declaration of forfeiture of the lease, for that was automatically brought about through the nonfulfilment of the condition, without any need for an express proviso for re-entry, and the court would have no jurisdiction to grant the appellant relief under section 83, inasmuch as that section would be inapplicable.

As appears from the foregoing, the substantial question in the appeal is whether the "Special Conditions" set out in the grant were, as the appellant contends, "covenants" within the meaning of section 83, so as to give the court power to grant relief from forfeiture under that section, or were, as the commissioner contends, conditions of defeasance as distinct from "covenants" and were therefore outside the scope of section 83; the commissioner being accordingly entitled to assert the forfeiture entailed under the general law by breach of a condition of defeasance, without thereby exposing himself to a claim for relief on the part of the appellant under section 83.

By the expression " condition of defeasance " their Lordships mean a condition of the kind described, and contrasted with a covenant, in the following passage from the judgment of Sir Kenneth O'Connor P., which their Lordships are content to adopt: " At common law, a condition is a qualification annexed " to an estate, whereby the latter shall either be created (con- " dition precedent), enlarged, or defeated (condition subsequent), " upon its performance or breach. The main distinction between " a condition subsequent for the cesser of the term of a lease upon " the happening of a certain event and a lessee's covenant is that " (subject to any right of relief from forfeiture given to the lessee) " upon breach of a condition the lessor may re-enter, because the " estate of the lessee is determined; whereas a breach of covenant " only gives him the right to recover damages (or to obtain an " injunction) unless the right to re-enter is expressly reserved to " him by the lease. Foa, Landlord and Tenant, 7th ed., pp. 311, " 312."

The special conditions were clearly not conditions precedent. They all related to things which the grantee was to do or refrain from doing after the grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants the breach of which (in the absence of any express proviso for re-entry) could only afford the commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in section 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the special conditions might combine in themselves the dual character of covenants and conditions of defeasance, as being agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the grant contains no such proviso. It would, however, also be brought about by any form of words importing an intention that a given stipulation should possess this dual character.

Their Lordships will later revert to this third possibility, in the meantime treating the classification of covenants on the one hand and conditions of defeasance on the other as exhaustive.

The point at issue turns upon the true construction of the grant, which must be construed in the light of the relevant legislation. The Ordinances immediately relevant are the Crown Lands Ordinance (Chap. 155 of 1948 Rev.) and the Registration of Titles Ordinance (Chap. 160 of 1948 Rev.). But it is also proper to refer to the earlier Crown Lands Ordinance of 1902 which, though replaced by the Ordinance of 1915, was relied on in argument by Mr. Cross (for the commissioner) as showing that while the appellant's argument might well have prevailed under the Ordinance of 1902, the Ordinance of 1915 made a radical change in the law, with the effect of investing stipulations such as the "Special "Conditions" with the character or conditions of defeasance as distinct from the character of "covenants" which they previously bore.

The Ordinance of 1902 provided for the inclusion of implied covenants in leases of Crown lands. Some of these covenants were to be included in all leases (see sections 12 and 13). These were ordinary covenants by lessor and lessee which no doubt were regarded as universally appropriate. Other lessees' covenants, which might not be appropriate in all cases, were to be implied in all leases except where expressly varied or excepted (see section 14). By section 15 the covenants by the lessee therein set out were to be implied in all building leases unless expressly varied or excepted. By section 16 a similar provision was made for the implication of certain lessees' covenants in leases of agricultural land. Section 18 (1) was in terms closely resembling those of the present section 83, omitting the second paragraph which was introduced in 1915.

Under the Ordinance of 1902 the difficulties which have now arisen with respect to the application of section 83 could hardly have arisen with respect to section 18 (1), for effect would have been given to stipulations such as the "Special Conditions" by means of express or implied covenants indubitably falling within section 18 (1).

The Crown Lands Ordinance of 1915, however, wholly repealed the Ordinance of 1902 and introduced new and different provisions with respect to leases. Section 3 of the Ordinance of 1915 empowers the Governor (by paragraph (i)) to "grant, lease or "otherwise alienate . . . any Crown lands for any purpose and "on any terms and conditions as he may think fit"; (by paragraph (ii)) to "wholly or partially remit . . . all or any of the "covenants, agreements or conditions contained in any lease, "agreement or licence . . . "; and (by paragraph (iii)) to "extend . . . the time to the purchaser lessee or licensee for "performing the conditions contained in any agreement, lease or "licence liable to revocation for such period, and upon such terms "and conditions, as he may think fit."

Section 5 provides for the appointment of a Commissioner of Lands to administer the Ordinance.

Part III of the Ordinance deals with the letting of town plots, to which category the plot now in question belongs. Section 13 provides that leases of town plots may be granted for any term not exceeding 99 years. By section 15 it is provided that leases of town plots shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction. By section 14, before any town plot is disposed of under section 15, the commissioner is required to "determine (*a*) the rent which shall be "payable in respect of such plot; . . . (*c*) the building conditions "to be inserted in the lease of the plot; and (*d*) the special "covenants, if any, which shall be inserted in the lease."

Section 16 requires notice to be given of the place and time of sale, and such notice is required to state (inter alia) "(*e*) the "building conditions and the special covenants, if any, to be "inserted in the lease to be granted in respect of any plot; . . ."

The lease in the present case was not in fact sold by auction, but the sections dealing with that method of disposal were relied on by Mr. Cross for their use of the expression "building "conditions" in contrast to the expression "special covenants." On the other hand, section 17 (also dealing with sales by auction) uses the expression "terms and conditions of the sale" in which "conditions" clearly does not mean "conditions of defeasance." Section 21 provides that in every lease of a town plot there is to be implied "a covenant by the lessee not to divide the plot and "assign any portion thereof." It is interesting to note that an express stipulation to the same effect appears as number 5 of the special conditions in the present case. Subsection (2) of section 21, which enables applications for leave to sub-divide to be made, provides that "no such application shall be entertained "unless the building conditions (if any) in the lease have been "complied with." Subsection (3) of the same section provides that new leases granted under subsection (2) shall be granted "on the same terms and conditions as the original lease." Other examples of implied covenants are to be found in various sections which need not be referred to in detail. See, for example, sections 36, 37, 38 and 39. Section 47, under the heading of "Part V—Disposal of Land for Special Purposes," implies covenants (a) not to assign, sublet, etc., without previous consent, and (b) not to use the land leased for any purpose other than the purpose or purposes specified in the lease. It is not clear that the plot now in question falls within Part V, but there is some significance in the fact that here again the "Special Conditions" include (as No. 4) a stipulation restricting user of the premises to "hotel purposes only except that shops may be constructed on "the ground floor," and (as No. 7) a stipulation against disposal of the land until special condition No. 1 has been complied with. Sections 63 and 64 contain references to the grant of leases "upon "such conditions as may be specified in such leases or as may be "prescribed" (section 63), and "upon such conditions as" the Governor "may deem expedient" (section 64).

Section 76 provides for an implied covenant for quiet enjoyment for the benefit of the lessee "paying the rent and fulfilling "the conditions" contained in the lease. Section 77 provides for implied covenants and conditions in every lease or licence by the lessee or licensee (putting it shortly) (a) to pay the rent and royalties thereby reserved, and (b) to pay the taxes charged on the land or the buildings thereon.

Their Lordships have already referred to the terms of section 83. By section 84 provision is made for the forfeiture of a licence for (inter alia) any breach of the conditions of the licence express or implied. By section 86 the acceptance by or on behalf of the Crown of any purchase-money or any rent or other payment is not to be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale, lease or licence of or respecting Crown land. Section 157 provides procedure under which possession may be obtained against any person in occupation of Crown land whose right, title or interest has expired or been forfeited, but this clearly cannot have been intended to override section 83.

Having considered all the various references to "covenants," "conditions" and "terms" which are to be found in the Ordinance of 1915, their Lordships are unable to hold that this enactment draws any clear cut or consistent distinction between the word " covenant " as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform, and the word " condition " as meaning a stipulation which the lessee may fulfil or not as he chooses but which, if not fulfilled, is to operate as a condition of defeasance. Mr. Cross did not seek to maintain that the word " conditions " was throughout the Ordinance used in the sense just stated, and admitted that it was sometimes simply used as equivalent to " terms." But he argued that in sections 14 and 16 " the building conditions to be " inserted in the lease " contrasted as it was with " special " covenants " did mean " conditions " in the technical sense of conditions of defeasance, so that the " building conditions " when inserted in the lease could only be framed as " conditions " in that sense and could not be imposed as obligations in the nature of covenants. Their Lordships find it impossible to accept this view. It appears to them that the expression " building conditions " means simply conditions as to building in the sense of the terms, or requirements, or stipulations, as to building which the lessee is to be bound to observe and perform under the lease. In their Lordships' judgment clear words would be necessary to justify the imputation to the legislature of an intention that the " building conditions " should not take effect as covenants but merely as conditions of defeasance, which would involve a radical departure from the commonly accepted practice. Their Lordships find no words in the Ordinance clearly enjoining acceptance of this construction of the Ordinance, and they decline to adopt it.

Accordingly, as the law stood between the enactment of the Ordinance of 1915 and the enactment of the Registration of Titles Ordinance, 1919, there was nothing to prevent " building conditions " under sections 14 and 16 of the former from being so framed as to operate as covenants on the part of the lessee. It is to be observed, however, that the special conditions in the present case were not strictly " building conditions " within sections 14 and 16, because the lease was not sold by auction, and, moreover, that the " special conditions " were not confined to building. But this, if anything, assists the appellant's case, for it is not suggested that it was not open to the Governor (apart from any restriction to be spelt out of sections 14 and 16 of the Ordinance where applicable) to impose such stipulations (whether by way of condition or covenant) as he thought fit.

On the other hand, their Lordships find it impossible to collect from the various references to covenants and conditions in other

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parts of the Ordinance any sufficient indication to justify the view that the words "lessee's covenants" in section 83 means lessee's covenants and conditions so as to bring within its scope mere conditions of defeasance. But they see no reason for excluding covenants which are also conditions, as constituting agreements or promises by the lessee to perform given stipulations, and at the same time making their performance a condition of the continuance of the lease. Indeed, as Rudd J. has pointed out, the provision for forfeiture in section 83 itself has the effect of turning all covenants into conditions in this sense.

Their Lordships should next state that in their opinion it is plain that under the Ordinance of 1915 the proper form of lease was an ordinary lease inter partes.

The next stage in the inquiry is to consider whether the "special conditions" in the present case, if inserted just as they stand in a lease of the plot granted between 1915 and 1919, would have operated as lessee's covenants or merely as conditions of defeasance. This depends on the true construction of the hypothetical document. One must assume that the words of demise expressed the demise to be made "subject to the following special "conditions," and that the lease went on to set out under the heading "special conditions" the 12 numbered paragraphs set out in the actual grant with which this case is concerned, but, like the actual grant, contained no statement in so many words that the grantee covenanted, or agreed, or promised to perform or observe such conditions.

The special conditions in question as set out in the present grant (omitting No. 1 to which reference has already been made) were in these terms:

"SPECIAL CONDITIONS.

"2. The building shall not be erected until plans (including "block plans showing the positions of the buildings and a system "of drainage for disposing of sewage surface and sullage water) "drawings elevations and specifications thereof shall have been "approved in writing by the Local Authority and the Commis- "sioner of Lands.

"3. The grantee shall properly connect the drainage and "sewage systems with any town systems when in the opinion "of the Commissioner of Lands and the Local Authority the latter "systems are so far completed as to enable the grantee so to do.

"4. The land and buildings shall be used for hotel purposes "only except that shops may be constructed on the ground floor.

" 5. The grantee shall not subdivide the land.

" 6. The buildings shall conform to a building line prescribed " by the Local Authority.

" 7. The grantee shall not sell transfer sublease or otherwise " alienate or part with the possession of the land nor enter into " any charge (other than with the consent of the Commissioner " of Lands for the raising of a loan for building purposes) or agree- " ment of sale in respect thereof until Special Condition Number " 1 has been complied with.

" 8. The grantee shall pay to the Commissioner of Lands on " demand such sum as the commissioner may estimate to be the " proportionate cost of constructing all roads drains and sewers " serving the land.

" 9. The grantee shall pay such rates taxes charges duties " assessments or outgoings of whatever description as may be " imposed charged or assessed by any government or local autho- " rity upon the land or the buildings erected thereon including any " contribution or other sum paid by the Governor in lieu thereof.

" 10. The Governor or such person or authority as may be " appointed for the purpose shall have the right to enter upon the " land and lay and have access to water mains service pipes and " drains telephone or telegraph wires and electric mains of all " descriptions whether overhead or underground and the grantee " shall not erect any building in such a way as to cover or inter- " fere with any existing alignments of main or service pipes or the " telephone or telegraph wires and electric mains aforementioned.

" 11. The main entrance to the building shall be set back to " provide for the setting down of vehicular passengers on the land " and similar provision shall be made for tradesmen's vehicles.

" 12. The water supply system of the building shall include " storage for at least twenty-four hours' requirements."

These conditions must be construed as a whole, and the mere fact that they are described as conditions is by no means conclusive of their character. It will be seen that they relate to a number of different matters of varying importance, all of which according to ordinary conveyancing practice would be made the subject of covenants with a suitable proviso for re-entry on breach. It will be seen further that they are for the most part expressed in such a way as to impose an imperative obligation on the lessee to perform and observe them. Paragraph 1 provides that " The grantee shall erect . . . " " and shall maintain . . ." Paragraph 2 is in the passive, but imposes restrictions on the doing of that which the grantee is obliged to do under No. 1, i.e., the erection of the building. Then by No. 3 "The grantee shall "connect . . ." No. 4 is expressed in the passive as is usual in the case of a restriction as to user.

Then comes No. 5, "The grantee shall not subdivide the "land." No. 6 relates to the building line, and may be said to concern the way in which the grantee is to carry out his obligation under No. 1. By No. 7 "The grantee shall not sell . . ." By No. 8 "The grantee shall pay to the commissioner . . ." By No. 9 "The grantee shall pay such rates taxes" etc. By No. 10 ". . . the grantee shall not erect" etc. Nos. 11 and 12 again refer to the characteristics of the building which the grantee "shall erect" under No. 1. Their Lordships therefore construe the special conditions as plainly designed to make it obligatory on the grantee to observe and perform them, as distinct from merely providing a list of stipulations which the grantee could comply with if he chose, but non-compliance with which would work a forfeiture. This view is strongly reinforced by the inclusion of the provisions in Nos. 8 and 9 for the payment of the sums therein mentioned. It could hardly be intended that these provisions were not to give the commissioner the right to sue the grantee for the amount mentioned in No. 8, or any sum which the commissioner might have had to spend in respect of the matters mentioned in No. 9. Again, it would be surprising if the commissioner was not to be entitled to restrain by injunction a sub-division of the land in breach of No. 5. The same observation applies to the restriction as to user contained in No. 4. The provision as to the repair of the building in No. 1 calls for similar comment. It would be surprising if the commissioner was to be unable to sue for damages in the event of the grantee's failure to repair.

All in all, this set of stipulations appears to their Lordships to include provisions wholly unsuitable for treatment merely as conditions of defeasance as distinct from covenants; and, inasmuch as the question turns on the intention of the parties to be collected from the document as a whole, this is a circumstance of considerable importance.

For these reasons their Lordships are of opinion that in a lease inter partes under the Ordinance of 1915 and before 1919, the special conditions would have constituted covenants within the meaning of section 83 of that Ordinance.

It remains to consider whether this conclusion as to the effect of the "special conditions" if they had appeared in a lease inter partes between 1915 and 1919 holds good with respect to those same conditions when included, as they actually are, in the grant now under consideration, being a grant operating as a lease but made as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance of 1919.

This Ordinance provides by section 1 (2) that "except so far "as is expressly enacted to the contrary no Ordinance in so far as "it is inconsistent with this Ordinance shall apply or be deemed "to apply to land whether freehold or leasehold which is under "the operation of this Ordinance." By section 2 "grant" is defined as meaning (inter alia) "any . . . lease . . . for a period "exceeding one year, made by and on behalf of the Crown . . ."

By section 20 "all land which is comprised in any grant "issued subsequent to the commencement of this Ordinance shall "be subject to this Ordinance, and shall not be capable of being "transferred . . . or otherwise dealt with except in accordance "with the provisions of this Ordinance and every attempt to "transfer . . . or otherwise deal with the same, except as afore-"said, shall be null and void and of no effect."

By section 21 "Grants shall be issued in duplicate in form B "(1) or B (2) in the First Schedule, as the case may be . . . The "grant in duplicate shall be delivered out of the Land Office to "the registrar of the registration district in which the land is "situated, who shall register the grant . . . and thereafter deliver "one of the duplicates to the Commissioner of Lands for issue "to the grantee, and retain the other to be bound up in the "register as hereinafter directed."

As has already been stated, form B (1) is the form prescribed for a grant of land by the Crown for a term of years, or in other words a Crown lease, and the present grant was made in that form, viz., as a deed poll and not as a deed inter partes.

It is argued on the commissioner's side that a deed in this form (the use of which is made obligatory by section 21 of the Ordinance of 1919) could not contain any covenants on the part of the lessee, inasmuch as he not only did not execute, but was not even expressed to be a party to, the grant. The effect of this argument, were it to prevail, would be far-reaching. It would be impossible for the commissioner to impose any express covenants on a lessee of Crown land, although the Ordinance of 1915 clearly authorises this. By parity of reasoning it would be impossible for any covenants on the part of such lessee to be implied. If it is indispensably necessary that the lessee should be a party to and execute the lease in order to be fixed with a covenant or obligation to do or abstain from doing what the lease expressly

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says he shall do or abstain from doing, then it must surely be equally necessary that he should be a party to and execute the lease in order to be fixed with a covenant to do or abstain from doing what the lease by statutory implication says he shall do or abstain from doing. Section 83 of the Ordinance of 1915 would thus, in effect, be wholly abrogated, except in cases of non-payment of rent.

The abolition of covenants and substitution of conditions of defeasance would prevent the commissioner from enforcing the terms of the lease except by forfeiture, which might well be against his interest. On the other hand, the lessee would be liable to suffer forfeiture without any claim for relief, however trifling the breach of condition, and however valuable to him the lease might be.

Their Lordships would not, unless constrained to do so, attribute these sweeping and untoward changes in the law to a form scheduled to what may be described as a procedural Ordinance.

It will be remembered that the form of grant B (1) is expressed to be subject to "the provisions and conditions contained in the "said Ordinance" (i.e., for present purposes the Ordinance of 1915). The effect of that language is reproduced in the present grant by the words "and subject also to the provisions of the "Crown Lands Ordinance (Chapter 155)." These words appear to their Lordships to import into the document itself a reference to section 83 of the Ordinance of 1915, and also to the covenants implied by sections 21 (1) and 77, the implication of which postulates a document in which covenants are capable of being implied. It would appear further that there are no express covenants in the document to which section 83 could apply, unless the special conditions are treated as covenants for the purposes of that section.

Their Lordships' conclusion on this by no means easy question is that, on accepting the lease and going into possession under it (as he undoubtedly did), the appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of section 83.

Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions, their Lordships would say that, in their opinion, a stipulation of that combined character would nevertheless be a covenant within the meaning of section 83, and the remedy by way of forfeiture (subject to relief) conferred by section 83 would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question.

It follows, in their Lordships' view, that Rudd J. did have jurisdiction to make the decree of May 2, 1957, relieving the appellant from forfeiture.

There remains the question whether, given the jurisdiction to grant relief, the judge was right in holding that this was a case in which relief from forfeiture should be granted and, if so, whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion.

This aspect of the case was included in grounds 2, 3 and 4 of the commissioner's memorandum of appeal to the Court of Appeal for Eastern Africa, but as that court decided in his favour on ground 1 (want of jurisdiction), it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connection with these grounds the commissioner applied to the Court of Appeal to adduce further evidence bearing upon the question whether or not it would be just to grant relief, and tending to show that the present appellant was no longer financially able to build an hotel.

There was some discussion before their Lordships as to the principles upon which the court should exercise its discretionary jurisdiction to grant relief against forfeiture in cases in which (subject to any relief the court may think fit to grant) the commissioner is shown to be entitled to a declaration of forfeiture under section 83. This turns on the words "subject to relief "upon such terms as may appear just" in the first paragraph of the section, in conjunction with the second paragraph, which provides that "In exercising the power of granting relief against "forfeiture under this section the court shall be guided by the "principles of English law and the doctrines of equity."

It appears to their Lordships that the effect of the second paragraph of section 83 is that where a case for forfeiture (subject to any relief the court may think fit to grant) has been made out under the first paragraph of the section, the court, in determining whether relief should be granted and, if so, on what terms, is to be guided by the principles upon which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date when the Ordinance came into operation, and by the doctrines of equity. In their Lordships' opinion the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to

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must be the statute law in force at the date when section 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and prima facie, a Kenya Ordinance could hardly be taken, in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content. This means, in effect, that the court is to be guided (which does not mean necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of the English courts under that section, so far as applicable to a case under section 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by section 14 (1) as necessary in order to make the forfeiture enforceable; and that the court should also have regard to the doctrines of equity. This accords with the view expressed in the case in the Court of Appeal for Eastern Africa of *Dedhar* v. *Commissioner of Lands*,[1] a case which is also noteworthy in that it was assumed without argument that a "special condition" in a post-1919 Crown lease of a town plot was a covenant within the meaning of section 83. For the reasons given in the judgment of Sir Kenneth O'Connor P. (at pp. 152 and 153 of the Record) their Lordships cannot accept the argument that the second paragraph of section 83 does not import a reference to section 14 of the Act of 1881 because that Act did not bind the Crown in England.

The view their Lordships have taken as to the application of section 83 makes it unnecessary for them to dicuss the question whether the appellant could otherwise have made good a claim to relief under the pure doctrines of equity on the ground of accident or surprise.

Their Lordships would express their indebtedness to the full and careful judgments of Sir Kenneth O'Connor P. and Rudd J. from which they have derived much assistance.

For the reasons above stated their Lordships are of opinion that this appeal should be allowed, and the order of the Court of Appeal for Eastern Africa dated March 24, 1958, should be discharged, and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 3 and 4 of the commissioner's memorandum of appeal to that court, and also the commissioner's application to adduce fresh evidence bearing upon these grounds.

Their Lordships will humbly advise Her Majesty accordingly. The commissioner must pay the costs of this appeal and of the hearing in the Court of Appeal. The order as to costs made in the Supreme Court will not be disturbed. The costs of the further hearing will be in the discretion of the Court of Appeal.

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[1] [1957] E.A.C.A. 104.

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Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

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April 20, 21, 22, 23, 27; *May* 14.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . APPELLANTS;
AND
ULSTER FARMERS' MART CO. LTD. . . RESPONDENT.

ULSTER FARMERS' MART CO. LTD. . . APPELLANT;
AND
SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . RESPONDENTS.

Market—Disturbance—Rival market—Purchase outside—Market in live pigs and pig carcases—Scheme between Ministry and co-operative society whereby live pigs and pig carcases sent to society's premises—Whether rival market—Object of scheme not the evasion of tolls—Whether any other form of disturbance.

The respondent company was the owner of the market place and market rights at Enniskillen, in the county of Fermanagh, Northern Ireland. The company's rights as market owner extended to numerous commodities including live pigs for slaughter of bacon weight and pig carcases. In 1940 the Ministry of Agriculture for Northern Ireland became the sole purchaser of live pigs for slaughter, and also the sole lawful buyer of pig carcases under the provisions of the Pig (Sales) (Northern Ireland) Order, 1940, which, however, authorised the Ministry to licence bacon curers to buy carcases themselves. The appellant society and other bacon curers were so licensed by the Ministry and they attended the market at Enniskillen and bought carcases there up to July 15, 1948. Before that date the society had no abattoir of its own, but brought certain live pigs by arrangement with the Ministry to the then market owner's abattoir for slaughter. This abattoir was closed down in 1947 and was not purchased by the company when it acquired the market rights from the former market owner in that year. In 1946 the society obtained permission from the Ministry to build an abattoir of its own, and the Ministry undertook to use the society's premises at Enniskillen as the principal collecting centre for County Fermanagh to which producers could bring live pigs which they had for sale. On July 19, 1948, the society's new premises were opened and the new scheme, following an advertisement in the local press, came into operation, under which live pigs bought by the Ministry were transported to the society's abattoir either at a subsidised rate or at the producer's own expense, and pigs killed on the farms were accepted by the society to be delivered at the producer's expense. In consequence no sale of live pigs for slaughter had been possible in the market, for there were no competent buyers, and the sale of dead pigs in the market ceased for the same reason. Furthermore, the society and the Ministry ceased to pay the market owner any sum for or in lieu of tolls, and the company's claim for tolls in respect of pigs passing through the society's premises had been met by the plea that no such tolls were payable.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

In an action by the company against the society, the Ministry and others, for alleged disturbance of its market rights by levying a rival market and otherwise:—

Held, (1) (*per* Viscount Simonds, Lord Reid, Lord Tucker and Lord Keith of Avonholm) that there was no levying of a rival market in respect either of live pigs for slaughter or pig carcases, as the society's premises did not provide facilities for a concourse of buyers and sellers, which was the essential feature of such a market.

Great Eastern Railway Co. v. *Goldsmid* (1884) 9 App.Cas. 927 and observations of Chatterton V.-C. in *Downshire* v. *O'Brien* (1887) 19 L.R.Ir. 380, 390 applied.

Per Lord Somervell of Harrow. The word "concourse" is ambiguous. The suggestion that an invitation to sellers in a market area might be a tort would be very far-reaching. If as a result goods are sold direct which previously went through the market, no tort is, in my opinion, committed against the holder of the market.

(2) That there was no other actionable form of disturbance, for it could not be suggested in the circumstances that the object of the scheme was to evade the payment of toll. A sale outside the market which had or might have the effect of depriving the market owner of toll or some other advantage was an actionable disturbance only if the person selling took or sought to take the benefit of the market; accordingly, the claim failed.

Decision of the Court of Appeal in Northern Ireland reversed in part.

APPEAL AND CROSS-APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J., Black L.J. and Sheil J.).

This was an appeal from the order of the Court of Appeal in Northern Ireland dated May 15, 1958, in so far as it allowed the appeal of the respondent, the Ulster Farmers' Mart Co. Ltd., from the judgment and order of the trial judge, Curran J., dated February 22, 1957, in an action wherein the appellants, the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland and others (not parties to this appeal) were defendants and the respondent was plaintiff, and in so far as the Court of Appeal by its order directed judgment in favour of the respondent in the action and directed certain inquiries as to damages and restricted the first named appellant from purchasing certain commodities at its premises in Enniskillen without the permission of the respondent. By petition of cross-appeal the respondent sought to have set aside those portions of the judgment of the trial judge which the Court of Appeal affirmed in favour of the appellants. The issue in this appeal was whether or not the activities of the appellants as established in the action were, and continued to be, an actionable interference with the respondent's market rights. The commodities in question in these proceedings were live pigs for slaughter (of bacon weight) and pig carcases for manufacture into bacon.

The facts are set out in the opinion of Viscount Simonds.

C. A. Nicholson Q.C., *E. W. Jones Q.C.*, *R. L. E. Lowry Q.C.* and *J. C. MacDermott* (all of the Bar of Northern Ireland) for the appellants. The question is whether the action of the appellants in establishing an abattoir in premises at Enniskillen and the setting up of a scheme in respect of the sale and disposal of live pigs and carcases constituted a disturbance of the respondent's market rights. A market right is an exclusive right to render certain services to the public within a limited area. The market owner is, as between the traders and the public, a third party; he provides a place for other persons to buy and sell goods. The essence of a market is a mixed concourse of buyers and sellers. From this has arisen the concept of the rival market—where a person competes with the market owner in his own line of business—doing *the very thing* "which [the market owner] "has the sole right to do": *Hopkins* v. *Great Northern Railway Co.*[1] To determine whether a rival market has been established the courts have adopted the test of the dual invitation, that is: has the alleged disturber invited buyers *and* sellers to use premises of his within the market area as a place in which to assemble as a concourse and buy and sell goods?

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[1] (1877) 2 Q.B.D. 224, 230.

Here the respondent must establish that the appellants by their activities have levied a rival market, or fail, because that is the only form of disturbance that the respondent can allege on the facts. Successfully to allege disturbance by selling outside the market the respondent must show an intention by the appellants to evade the payment of toll and establish a fraud on the market, that is, that the benefit of the market has been taken: *Brecon Corporation* v. *Edwards*[2]; Halsbury's Laws of England, 3rd ed., vol. 25, p. 403; Pease and Chitty's Law of Markets and Fairs, 2nd ed., pp. 68, 69; but that is not shown here. Further, there is no evidence at all that there has been disturbance by hindering the market, as to which the authorities show that for an action to lie there must have been some physical obstruction or trespass to persons using the market or to the market premises themselves. Nor is this a case of a fraud on the market. No benefit is taken from the market; there is nothing which resembles the essential character of the fraud on the market cases, namely, that some advantage is taken from the market such as the interception of goods on their way to market on market day, or bringing a purchaser out of the market to buy goods so as to avoid payment of toll: *Bridgland* v. *Shapter*.[3]

The essential nature of a rival market is the dual invitation to the public to come and buy and sell; the importance of the public element is stressed in *Goldsmid* v. *Great Eastern Railway Co.*[4] In *Corporation of London* v. *Lyons, Son & Co. (Fruit Brokers) Ltd.*,[5] although there were elements to suggest that the defendants carried on a market, on application of the dual invitation test it was held that there was no rival market, since, in effect, there was a concourse of buyers only. [Reference was also made to *Fearon* v. *Mitchell*.[6]] *Elwes* v. *Payne*[7] supports the appellants' contention that the "auctioneer cases" were held to be rival markets because of the services provided for the public. Furthermore, the auctioneer was not selling his own goods but the goods of others. Thus buyers and sellers were brought together on the defendants' lands to buy and sell goods. This was a marketing service in contrast to trading. The defendant who provided the field for auctions was doing the very thing which the market owner had an exclusive right to do. [Reference

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[2] (1862) 1 H. & C. 51.

[3] (1839) 5 M. & W. 375.

[4] (1883) 25 Ch.D. 511, 538–543, 547; affirmed on appeal sub nom. *Great Eastern Railway Co.* v. *Goldsmid* (1884) 9 App.Cas. 927, 946, 958, 961.

[5] [1936] Ch. 78, 130–132, 145.

[6] (1872) L.R. 7 Q.B. 690.

[7] (1879) 12 Ch.D. 468, 471, 473.

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was also made to *Mayor of Dorchester* v. *Ensor*.[8]] *Wilcox* v. *Steel*[9] is distinguishable on the grounds that there the defendant held out invitations to more than one seller.

A comparison of the activities carried on at the society's premises with those of a market shows a number of important distinguishing features, in particular the absence of a concourse at the society's premises which, unlike a market, are private, not public. There is no exposure for sale, no competition, no bargaining, the price is fixed, the goods are delivered to a predetermined purchaser. It is a trading and not a marketing activity.

The judgment of Lord MacDermott C.J. stated two propositions which the appellants submit are correct and on which they rely, namely: (1) That acts which damage or adversely affect the market owner's enjoyment of his franchise will not necessarily amount to a disturbance; (2) that the existence of a general market franchise for a particular commodity does not mean that there can be no legitimate buying or selling of marketable commodities within that locality but outside the market, and that the market owner's rights are centred on the market place and on the facilities made available there for those who want to use them. Reliance is also placed on the statement of Mellish L.J., delivering the judgment of the Court of Appeal in *Hopkins* v. *Great Northern Railway Co.*,[10] a case relating to disturbance of a ferry, that " the owner of a ferry has not a grant of an exclusive " right of carrying passengers and goods across the stream by " any means whatever, but only a grant, of an exclusive right to " carry them across by means of a ferry." Similarly, the fact that a bridge is built across the market stream, which may make the market useless, does not give the market owner a right of action against the builder. The right of the respondent here as owner of the market franchise was to render to the public marketing services, but not a right to prohibit dealings in goods outside the market, or to compel a vendor or purchaser to resort to the market. Further, the view of Lord MacDermott C.J. that private sales on private premises owe nothing to the franchise is adopted. They are not brought about or facilitated by the market and the concourse of buyers and sellers it attracts. Reliance is placed on these principles, but it is submitted that they have not

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[8] (1869) L.R. 4 Ex. 335, 339, 341.

[9] [1904] 1 Ch. 212, 217, 220, 222–224.

[10] 2 Q.B.D. 224, 230, 231.

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been correctly applied. The Court of Appeal was in error in holding that what was done by the appellants was anything more than a private sale. An invitation to the public to come and sell to the invitor is lawful and not an infringement of the market right. Similarly, an invitation to the public to come and buy from the invitor is no infringement. Without a dual invitation there could be no rival market. Short of a rival market there is no evidence of disturbance because no benefit is taken. [Reference was also made to Viner's Abridgment, 2nd ed., vol. 15, p. 242, *Stretch* v. *White* [11] and *McCutcheon* v. *Carney*.[12]]

W. F. Patton Q.C., *J. A. Brown Q.C.* and *B. Kelly Q.C.* (all of the Bar of Northern Ireland) for the respondent and cross-appellant. A market franchise is a species of property. A franchise granted by the Crown in perpetuity is just as much property as is a fee simple in an acre of land. In return for the rights he obtains under the grant the grantee is subject to certain obligations. There is no allegation in the present case that the respondent company has been guilty of any neglect or dereliction of its duties, and, accordingly, it is only the respondent's rights which have to be considered. The authorities show a reluctance on the part of judges to determine exhaustively the nature of a market, but there are two descriptions which are classic and reliable. The appellants contend that the right of the respondent as owner of the market franchise is a right to render to the public marketing services, but not a right to prohibit dealing in goods outside the market, or to compel a vendor or purchaser to resort to the market. That is not a workable definition of a market and no authority is cited in support of it, and that is not surprising, for it would be odd to speak of the rendering of a service as a *right* when in fact it would be an *obligation*. In *In re Islington Market Bill* [13] it is stated that " an " *obligation* " is cast upon " the grantee of a market, " by his acceptance of the grant, to " provide convenient accommodation for all who are ready to " buy and sell in the public market ": *per* Littledale J. in the House of Lords.

The two descriptions of a market referred to above, and which are adopted, are first that of Chatterton V.-C. in *Downshire* v. *O'Brien* [14]: " A market is properly speaking the franchise right of " having a concourse of buyers and sellers to dispose of commo- " dities in respect of which the franchise was given." Secondly, that of Lindley L.J. in *Goldsmid's* case[15]: "An exclusive right "of inviting the public to come and buy and sell in the place "where the franchise has authorised the market to be held." The market owner is the only person who can issue such an invitation, otherwise it would not be exclusive. To bring an action for disturbance it is not necessary to have a right to toll. The market owner is suing in respect of damage to his property, his franchise, that is, in respect of anything which makes the franchise less valuable to the market owner or to any possible purchaser of the franchise. Disturbance may vary between 100 per cent. disturbance and a single sale outside the market with intent to avoid toll. There is no point in that chain where the disturbance becomes something of a different nature. There is no warrant in the authorities for making any such distinction, for they go no further than this, that, to qualify as such, a rival market does not need to have all the attributes of a franchise market or to amount to a 100 per cent. disturbance of the legal market.

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[11] (1861) 25 J.P. 485.

[12] [1938] Ir.Jur.Rep. 73.

[13] (1835) 3 Cl. & Fin. 513, 518.

[14] (1887) 19 L.R.Ir. 380, 390.

Judges have refused to give a definition of disturbance of a market: see, for example, *per* Jessel M.R. in *Manchester Corporation* v. *Lyons*.[16] Whether in fact there is a disturbance depends on the circumstances in each particular case. Disturbance bears the same relationship to a franchise as trespass does to land. Disturbance may occur in one of two ways: (1) by the disturber seeking to do some or all of the things which the franchise gives the franchise owner the right to do; (2) in doing elsewhere those things which the franchise owner has the exclusive right of allowing other persons to do on his property. *Goldsmid's* case[17] was plainly an instance of the setting up of a rival market, and both Cotton and Fry L.JJ. in the Court of Appeal refused to define disturbance. In the House of Lords[18] Lord Blackburn stated that the question whether there was a disturbance was one of mixed fact and law.

Mayor of London v. *Low*[19] is analogous to the present case, for irrespective of the question whether the appellants had on their premises a concourse of buyers and sellers, they did acts which, if done in the market, would have been liable to toll. The present case can be dealt with simply on the principle that the respondent has an exclusive right to invite persons to come and buy and sell on its land. If an outsider exercises *any*, not necessarily all, of the respondent's rights, he has invaded them. The fact that the outsider has invited only *sellers* and not buyers is not an answer to the respondent's claim. Examples of a 100 per cent. disturbance are *Yard* v. *Ford*,[20] *Midleton* v. *Power*[21] and *Cork Corporation* v. *Shinkwin*.[22] An example of a disturbance less than 100 per cent. is *Mayor of Dorchester* v. *Ensor*,[23] where it was held that a person who conducted an auction was guilty of holding a rival market, although, it is to be observed, there was no concourse of sellers.

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[15] 25 Ch.D. 511, 548.

[16] (1882) 22 Ch.D. 287, 306.

[17] 25 Ch.D. 511, 540, 556, 557.

[18] 9 App.Cas. 927, 961.

[19] (1870) 49 L.J.Q.B. 144, 149, 151, 152.

Any course of conduct systematically adopted within the limits of the market area, if it bears a resemblance to acts which would be done in the market, injures the market and is actionable as a disturbance because it infringes the market owner's franchise. The key to the "auction cases" is that the market owner's rights are infringed by an invitation to a section of the public to come on to other premises for the purposes of buying and/or selling. The trespass is in the issue of the invitation, and the selling is only the proof of damage resulting from the issue of that invitation. In the present case the issue of the advertisement was the disturbance. The respondent was the only person with a right to issue such an advertisement. Even if there had resulted not a single sale of a pig, dead or alive, the respondent would have been entitled nevertheless to apply for an injunction the day after the advertisement appeared. It is emphasised that to constitute a disturbance of the market the market owner does not have to prove that the disturber has disturbed *all* the market owner's rights. An interference with the flow of goods coming to the market is a disturbance: *Turner* v. *Sterling*[24]; similarly, a hindering of tollable goods: *per* Powell J. in *Ashby* v. *White*,[25] quoted with approval by Lord Ellenborough C.J. in *Bailiffs of Tewkesbury* v. *Diston*.[26]

A sale in a shop or in private premises near a market can constitute a disturbance: Pease and Chitty's Law of Markets and Fairs, 2nd ed., pp. 66, 158. The authorities establish that, for a defendant successfully to defend an action for disturbance on this ground, he must show that the sale was (1) of the defendant's own goods, (2) in his own shop and (3) in the ordinary course of business. The implication is that any other type of transaction would be a disturbance. Further, if any of the three elements is missing, then prima facie the sale constitutes a disturbance. For example, the defendant sells some other person's goods in the defendant's shop, or he sells his own goods in another person's shop, or, even, he sells his own goods in his own shop but *not* in the ordinary course of business. An example of the last type of transaction would be that of a grocer, who has a farm, selling some of his cattle at his shop within the limits of the market area.

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[20] (1670) 2 Saund. 172.
[21] (1886) 19 L.R.Ir. 1, 5.
[22] (1825) Sm. & Bat. 395.
[23] L.R. 4 Exch. 335, 341, 342.
[24] (1672) 2 Vent. 25, 26.
[25] (1704) 6 Mod. 45, 49.
[26] (1805) 6 East 438, 462.

On disturbance generally, the respondents rely on the following propositions as constituting a disturbance of the market: (1) The doing by the disturber outside the market of acts which ought to be done on the market, or the preventing of acts from being done on the market which ought to be done there: *Loughrey* v. *Doherty*.[27] The principle of that case is applicable here. It is good authority for the proposition that the preventing of goods coming to market is an actionable disturbance. (2) Selling out of the market to the prejudice of the market owner's right: *In re Islington Market Bill*[28]; see also *Wilcox* v. *Steel*.[29] It is submitted that in the present case there was an intention on the part of the Ministry and the society to evade the payment of toll. Further, the market owner has a right "to prevent any "person doing any acts which amount to a disturbance of 'his' "market, that is, which amount to anything like acts which "would have been done on the market, and which, if done, "would have produced a larger income" to the market owner: *per* Lush J. in *London* (*Mayor of*) v. *Low*.[30] Systematic acts of that nature constitute a disturbance. As to what constitutes a fraud on the market, see the observations of Fry L.J. in *Goldsmid's* case[31] and of Maugham L.J. in *London Corporation* v. *Lyons, Son & Co.* (*Fruit Brokers*) *Ltd.*[32]

The appellants contended that unless it were shown that they had set up a rival market the action must fail because there was no other form of disturbance. That is unsustainable, for selling outside the market, buying outside the market and the establishment of a system all constitute a form of disturbance distinct from that of setting up a rival market.

It was said that the sine qua non for a rival market was the existence of a concourse of buyers and sellers. But it is plain from the authorities that for a rival market to be such it does not have to be an exact replica of a franchise market. How far short it may fall is not the subject of any decision, but the suggestion that there must be a dual invitation to buyers and sellers is not supported by the authorities. The appellants relied on *Goldsmid's* case,[33] but that authority shows that the only sine qua non is the provision of a place where the public may sell goods. If the defendant has provided a place where persons may sell goods, and in fact goods are sold there to the damage of the franchise market, an action for disturbance will lie.

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[27] [1928] I.R. 103, 111, 115, 119.
[28] 3 Cl. & Fin. 513, 518.
[29] [1904] 1 Ch. 212.
[30] 49 L.J.Q.B. 144, 151.
[31] 25 Ch.D. 511, 556.
[32] [1936] Ch. 78, 141.

In the present case there were on the society's premises two purchasers; the society itself had a "stall" at which to buy carcases, and the Ministry had a "stall" at which to buy live pigs. That constitutes a rival market. Suppose six persons, who are joint tenants of land within the limits of the market, jointly invite persons to sell goods thereon, the joint tenants being the purchasers. It would be very extraordinary if in these circumstances there was not a rival market, for there would be on the land a concourse of buyers and sellers. But it is to be noted that in that case there is only a *single* invitation, namely, to sellers only, not an invitation also to buyers, for one joint tenant does not invite another, since they all have an equal right to enter upon the land. It is also submitted that the Ministry, buying as they did, not for themselves, but for the purpose of distributing what they bought, was as much a concourse of buyers as an auctioneer is a concourse of sellers.

The respondent's case against the appellants may be summarised as follows: The respondent claims the sole right in Enniskillen to invite persons to come and sell on its premises. The appellants issued an invitation to such persons to come and sell marketable commodities on the appellants' premises to the prejudice of the respondent, and for that disturbance the respondent is entitled to relief. Moreover, the Ministry and the society engaged in activities and entered into transactions to do deals out of the market which ought to have been done in the market; they did that with the view of escaping tolls, and, furthermore, they did it on a deliberately devised system. As part of that system they made money payments to induce persons to engage in that system, with a view to inducing them to enter into transactions which would avoid the payment of tolls. [Reference was also made to *Hopkins* v. *Great Northern Railway Co.*[34]]

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[33] 9 App.Cas. 927, 946, 948, 956.

[34] 2 Q.B.D. 224.

J. A. Brown Q.C. following. It is of fundamental importance in the present case that the Ministry and the society, in agreement together, have set out to capture the respondent's trade and/or evade the payment of toll. With regard to disturbance other than by levying a rival market it is necessary to examine the substance of the scheme set up by the Ministry. It involved: (a) a general invitation to all pig producers; (b) a highly organised system, including subsidised transport facilities; (c) a sale within the limits of the respondent's market. The test to ascertain whether there has been a disturbance is to look at the effect on the franchise. In the present case the market in pigs ceased completely after the opening of the society's premises. That amounts to an actionable disturbance: see *per* Lord Ellenborough C.J. in *Bailiffs of Tewkesbury* v. *Diston*[35] and *per* Earl of Selborne L.C. in *Goldsmid's* case.[36] Further, in *Loughrey* v. *Doherty*[37] Kennedy C.J. was of the opinion that the concerted action of buyers who intercept sellers on their way to market, and thereby empty the market of its marketable wares and rob the franchise owner of the enjoyment and benefit of his franchise, could amount to an actionable disturbance; and FitzGibbon J. dissented[38] only on the question of isolated transactions, which, in his view, did not amount to a disturbance of the market. In the present case the issue of the advertisement relating to the scheme amounted to an interception which was more effective as such than a physical interception would have been in earlier times. It was suggested that any alleged disturber must be availing himself of the benefit of the concourse of the market, but that is not the law: see *per* Fry L.J. in *Goldsmid's* case.[39]

As to disturbance by levying a rival market, it was said that the sine qua non of a rival market was that there should be a dual invitation to buyers and sellers and that there must be a plurality of both. Those are not the true indicia of a rival market; the true test is: is it a rival place of sale? That is precisely what the society's premises are. *London Corporation* v. *Lyons, Son & Co.* (*Fruit Brokers*) *Ltd.*[40] was decided on its own special facts and is plainly distinguishable from the present case: see the observations of Maugham L.J.[41]

In conclusion, whether or not it is in the public interest for the appellants' activities to continue is not a question for a court of law to entertain. If the respondent's market rights have been infringed by the appellants it is for the courts to protect those rights from further infringement: *per* Lord Blackburn and Lord FitzGerald in *Goldsmid's* case.[42] [Reference was also made to the Pig (Sales) (Northern Ireland) Order, 1940; Maxwell on the Interpretation of Statutes, 10th ed., p. 285; *Mayor of London* v. *Low*[43]; *Birmingham Corporation* v. *Foster*[44]; *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*[45]]

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[35] 6 East 438, 462.

[36] 9 App.Cas. 927, 948.

[37] [1928] I.R. 103, 117.

[38] Ibid. 122.

[39] 25 Ch.D. 511, 556.

[40] [1936] Ch. 78.

[41] Ibid. 144, 145.

Counsel for the appellants were not called on to reply either on the appeal or on the cross-appeal.

Their Lordships took time for consideration.

1959. May 14. VISCOUNT SIMONDS. My Lords, in June 1947 the respondents Ulster Farmers' Mart Co. Ltd., whom I will call "the respondents," became possessed of the exclusive right in fee simple by letters patent dated respectively May 28 in the tenth year of the reign of King James I and February 20 in the fifty-third year of the reign of King George III to hold markets and fairs in or at Enniskillen in the county of Fermanagh and to exercise all the rights set forth in the said letters patent. And they have at all material times held 12 fairs in every year and a market each Tuesday and Thursday in every week in exercise of the rights conferred by the said letters patent and of rights exercised by them and their predecessors in title from time immemorial or conferred by letters patent which have been lost or destroyed by accident. This statement of relevant fact I take from an agreed statement of facts in the action, out of which this appeal arises, and I do not think it necessary to examine further the origin or nature of the franchise except in one respect with which I will deal hereafter. It is, however, proper to mention that in the original grant there appeared a provision which the Lord Chief Justice (Lord MacDermott) called "the prohibition." It is a peculiar provision such as I do not remember to have seen before either in the grant of a franchise of market or elsewhere and it was at one time thought to have some importance, but at the hearing of this appeal it faded out and I will say no more about it.

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[42] 9 App.Cas. 927, 961, 964.

[43] 49 L.J.Q.B. 144, 151.

[44] (1894) 70 L.T. 371, 372; 10 T.L.R. 309.

[45] [1919] A.C. 744, 752, 754, 760; 35 T.L.R. 552.

Such being their market rights on December 19, 1949, the respondents, being aggrieved by the transactions to which I will presently refer, issued a writ against the appellants, the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland (whom I will call respectively "the society," "the Minister" and "the Ministry") and certain other persons and bodies, who are not parties to this appeal, claiming a declaration in respect of their market rights, a declaration that the society had disturbed them in their said rights by the levying of a rival market and otherwise, damages for such disturbance and the appropriate injunctions and in addition damages for conspiracy.

Before I come to the circumstance which immediately gave rise to the action, namely, the opening of a new modern abattoir and the establishment of a live pig collecting centre at the society's factory in Enniskillen on July 15, 1948, I must state a few facts which are not in dispute.

The respondents' market rights extended to numerous commodities, but this case is concerned with only two of them, live pigs for slaughter of bacon weight and pig carcases. The first of these was not sold in the market or, it was said, anywhere in Northern Ireland, before 1934, and it was suggested that it was not a commodity to which market rights extended. This view was not accepted by Curran J. who tried the case, or by the Court of Appeal, and I see no reason to differ from them. Up to 1934, therefore, the market (so far as relevant) was a dead pig or carcase market and was held every week on Tuesdays only. Live pigs were sold as stores at the monthly fairs.

In the year 1933 an organisation called "the Pigs Marketing "Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area.

On January 15, 1940, the Ministry, as agent for the Ministry of Food under and by virtue of the provisions of the Pig (Sales) (Northern Ireland) Order (being S.R. & O. No. 39 of 1940 made under the authority of Regulation 55 of the Defence Regulations, 1939), became the only person authorised to purchase live pigs for slaughter in Northern Ireland, thus succeeding to the Pigs Marketing Board's monopoly. By virtue of the same Order it also became the sole lawful buyer of pig carcases but was authorised to license bacon curers to buy carcases for themselves. It did so license the society and other bacon curers who attended the carcase market on Tuesdays and bought carcases there. This was until July 1948. It had in the meantime been enacted by S.R. & O. No. 1080 of 1947 (made under the authority of the same Defence Regulation) that no person might slaughter a pig for manufacture to bacon except for sale to a licensed curer.

I must now say a few words about the position of the society. It was at all material times a licensed bacon curer but it had before July 1948 no abattoir of its own. By arrangement with the Ministry it brought live pigs to the then market owner's abattoir for slaughter. This abattoir was closed down in the year 1947 and was not purchased by the respondents when they acquired the market rights in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, the Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. It has not been suggested that the rights of the parties were in any way affected by these payments.

I come now to the year 1948, reminding your Lordships that up to that time the carcase market was still active though the society, mainly if not entirely, made its purchases outside and had the carcases taken direct to its own premises. In 1948 a scheme (a word that I use in no sinister sense) which had for long been under consideration by the Ministry and the society was brought into operation. I can best describe the salient features of this scheme by a citation from the judgment of the Lord Chief Justice, to whom the House is indebted for a clear and exhaustive exposition of the facts. This is what he says: "The outcome of the negotiations between the society and the "Ministry was that the necessary alterations and extensions were "made at the society's premises [i.e., the building of an abattoir "and enlarged storage space with refrigeration and modern "machinery] and the Ministry then transferred its live pig "collecting centre there. The new project, as I shall call it, "came into operation on July 19, 1948, following an advertise-"ment in the local press inserted with the knowledge and "approval of the Ministry.

"This advertisement announced the opening of the society's "new abattoir and that the Ministry's live pig receiving depot "would be established there and would provide for the accept-"ance of live pigs from producers in County Fermanagh and part "of County Tyrone. Then came a statement to the effect that

" live pigs would be conveyed from the farm to the abattoir by " the Northern Ireland Road Transport Board at an ' all-in ' " charge of 8d. per pig but that producers who wished to deliver " their own pigs to the abattoir would not have to pay this " charge. The advertisement next gave the basis on which live " pigs would be paid for by the Ministry, and after that it informed producers that what they had to do, if they wanted " the transport service offered for pigs ready for slaughter, was " to give notice by postcard or telephone not later than the Friday " morning prior to the week of the required uplift to the society's " office or the Transport Board's office or to one of the three " named agents who included the defendants Messrs. Noble & " Thompson [who are no longer parties to the proceedings]. The " advertisement then ended by announcing that the society ' are " ' still prepared to accept farm killed pigs delivered at producer's " ' expense to their premises. These will be paid for at current " ' official prices for dead pigs.' "

The learned Chief Justice then pointed out that one of the attractions of the new project as thus advertised was undoubtedly the cheap transport facilities it made available. It was in fact clear that such transport was heavily subsidised. He summed up the situation in words upon which I cannot hope to improve: " The result of this has been twofold: no sale of live pigs for " slaughter has been possible in the market for there have been " no competent buyers and the sale of dead pigs has stopped " for the same reason. Since July 19, 1948, the society and " the Ministry have ceased to pay the market owners any sum " for or in lieu of tolls and the plaintiffs' claim for tolls in " respect of pigs passing through the society's premises has been " met by the plea that no such tolls are payable. There cannot " be any doubt that the effect of the new project as it has been " operated has been to make most producers in the area sell " their bacon pigs alive instead of dead and to withdraw the " bacon pig trade from the plaintiffs' market." It was in fact clear that the respondents' market rights in carcases had, as Curran J. had observed, been rendered valueless as the direct result of the scheme.

In these circumstances the question arises whether the transaction, in which the Ministry and society were thus involved, though it might otherwise be regarded as a legitimate trading transaction, and, beyond that, beneficial to the community by means of a reduction in the handling of pigs and a consequent improvement in their quality and the making of economies in their collection, was yet actionable as a disturbance of the respondents' market rights. The course which the action has taken precludes me from dealing forthwith with the case as on a single issue. For, though Curran J. dismissed the whole action, a distinction was made in the Court of Appeal, which admitted the claim to the extent that I will now indicate. It will be remembered that the advertisement to which I have referred offered to producers the choice of sending live pigs to the society's premises by means of transport provided by the Ministry or by means of transport provided by themselves. The Court of Appeal decided that, when producers adopted the first alternative, no actionable wrong was committed by the society or the Ministry, but that, when the second alternative was adopted and the Ministry sold to the society the pigs thus delivered at the society's premises, there was a disturbance of the respondents' market for which the society and the Ministry were liable in damages. Similarly, the Court of Appeal held that the purchase by the society of dead pigs delivered by producers at their premises was a disturbance by the society of the market and an actionable wrong. Hence your Lordships are faced with an appeal by the society and the Ministry against one part, and a cross-appeal by the respondents against another part, of the judgment.

My Lords, before I consider whether there is any justification for the differentiation made by the Court of Appeal, I must examine somewhat more closely the nature of the respondents' claim that their market rights have been disturbed. In what way, it must be asked, have they been disturbed? "Disturbance of a market" says the classic textbook (Pease & Chitty, on Law of Markets and Fairs, 2nd ed., p. 62) "may be either by unlawfully setting up a rival market, or by doing some other act or acts whereby the market-owner is deprived, either wholly or in part, of the benefit of his franchise." The respondents accordingly followed the traditional path by alleging a disturbance by the appellants of their market by the levying of a rival market or otherwise. It was the levying of a rival market that they put in the front of their case and that was the only disturbance which was the alleged subject of conspiracy. It was also the ground upon which they obtained a partial judgment in their favour from the Court of Appeal. It was, however, open to them to establish disturbance otherwise, and it was to this aspect of the case that their argument before your Lordships was largely directed.

I will deal first with the allegation that the appellants levied a rival market. In my opinion the respondents fall far short of establishing anything of the kind. Once more I will cite Pease & Chitty (p. 65): "What is a rival market is a question of "fact. To sustain an action for disturbance by setting up a "rival market, it is not necessary to show that the defendant "has set up what purports to be a legal market, or has usurped "a franchise on the Crown by taking toll or holding a court of "pie powder. It is enough that he has erected stalls on his own "soil and taken rents in the nature of stallage for their use by "persons bringing their goods thither for sales, or has so used "his land as to encourage and provide for a concourse thereon of "buyers and sellers; for instance, by establishing a depot with "conveniences for the benefit of buyers and sellers, or by holding "public auctions or sales whereby persons are provided with a "means of selling their goods without bringing them to market. "Where, however, he does not publicly invite sellers indiscriminately but sells the goods of others under contract or by private "arrangement he is not levying a rival market but is selling "outside the market." It appears to me, my Lords, that this is an accurate and sufficiently exhaustive statement of the law and that it is supported by the cases that were cited at the Bar, of which I mention only *Great Eastern Railway Co.* v. *Goldsmid*,[1] *London Corporation* v. *Lyons, Son & Co.* (*Fruit Brokers*) *Ltd.*,[2] *Mayor of Dorchester* v. *Ensor*,[3] *Elwes* v. *Payne*,[4] and *Wilcox* v. *Steel*.[5] In the passage that I have cited, as over and over again in the cases that support it, the essential feature of a rival market is said to be the provision of facilities for a concourse of buyers and sellers. This follows logically from the nature of a franchise of market of which no better definition has been given than by Chatterton V.-C. in *Downshire* v. *O'Brien*[6]: "A market is properly speaking the franchise right of having a "concourse of buyers and sellers to dispose of commodities in "respect of which the franchise was given."

Let me then examine the class of case which is the subject of the cross-appeal, viz., where the producer has availed himself of the transport facilities provided by or on behalf of the Ministry. The learned Lord Chief Justice has held (and Black L.J. agreed with him) that in such a case, the sale to the Ministry having taken place at the farm at which the live pigs were delivered, there was so far no disturbance of the respondents' market rights. The market owners never had the right to prevent a farmer from selling privately on his farm, whether the sale was of one or two or a large number of pigs. Equally the same learned judges were of opinion that neither by bringing all the pigs so bought to the society's premises as a collecting centre nor by then selling them, whether before or after slaughter, to the society did the Ministry or the society in any way establish a rival market to the disturbance of the respondents' rights. It appears to me that this conclusion is unimpeachable, and the only criticism that I venture to make, which becomes of importance in considering the next class of case, is that the learned Chief Justice appears to me to attach too much significance to the fact that the sale takes place at the place at which the pigs are delivered to the transport authority or other agent of the Ministry. This, therefore, brings me to the second class of case, where the producer brings the live pigs to the society's premises by his own transport.

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[1] (1884) 9 App.Cas. 927; sub nom. *Goldsmid* v. *Great Eastern Railway Co.* (1883) 25 Ch.D. 511.

[2] [1936] Ch. 78; 51 T.L.R. 563.

[3] (1869) L.R. 4 Exch. 335.

[4] (1879) 12 Ch.D. 468.

[5] [1904] 1 Ch. 212.

[6] (1887) 19 L.R.Ir. 380, 390.

My Lords, the learned Lord Chief Justice proceeded to the consideration of this class of case upon the basis that the contract for sale of the pigs took place on the society's premises. He found that this created a radically different situation and held that it would be quite wrong and unrealistic to regard transactions induced by the invitation contained in the advertisement as private sales on private premises. He thought that the result was to make the society's premises a concourse of sellers though not of buyers, but was of opinion that the one-sided nature of the concourse facilities did not prevent what had been done in this connection constituting a rival market. Here, my Lords, I must reluctantly differ from the Lord Chief Justice. I am by no means satisfied, from an examination of the relevant documents, that in this second class of case as in the first, the sale does not take place at an earlier date, viz., when the Ministry acknowledges the producer's so-called "entry of pigs" and directs him to arrange to deliver them to a named place or person on a named day. This view, I believe, commends itself to some of your Lordships. If so, there is an end of the differentiation between the two classes of case. But, whether this is so or not, I cannot accede to the view that a rival market is levied even if the sale to the Ministry takes place on the society's premises and the Ministry (as the fact is) then sells to the society the pigs it requires and dispatches any surplus to Belfast. It is true upon this assumption that a number of sellers take their produce to the same premises, though it would be a misuse of language to speak of a "concourse" of sellers. But apart from this there does not appear to be any single feature of a market. So far from there being a concourse of sellers and buyers, the public had no right to enter upon the society's premises in order to buy: and not only had they no right to enter but entry would have availed them nothing, for the Ministry, as they were well entitled to do, made their own arrangements for the disposal of the pigs. No doubt there have been cases where a rival market has been held to be established when all the sales have been made by a single auctioneer acting on behalf of a number of sellers, but such cases are remote from the present case and must, in any event, in view of the observations of Maugham L.J. in *London Corporation* v. *Lyons, Son & Co.* (*Fruit Brokers*) *Ltd.*,[7] be very closely scrutinised.

What I have said about the second class of live pigs applies also to the sale of carcases to the society. In this the Ministry have no part. The society advertises its willingness to buy carcases: the producers bring them to its premises. The society takes them, pays for them, and uses them for its own purposes. I will presently examine whether this can in any other way be regarded as a disturbance of the respondents' market, but to the proposition that it is a disturbance by levying a rival market I can by no means assent. I sum up this part of the case, therefore, by saying that the respondents fail in respect of both classes of live pigs and of carcases to make good their claim of disturbance by a rival market.

But, my Lords, this does not conclude the case; for, as I pointed out some time ago, disturbance may take some other form than levying a rival market. This aspect of the case has caused me the difficulty that is commonly created when it is sought to pour new wine into old bottles. For let it be said at once that there is no case in the books which in its facts remotely resembles the present one. Counsel for the respondents, taking as their text the latter part of the first citation that I made from Pease & Chitty, contended, that since there may be disturbance of a market by doing an act whereby the market owner is deprived either wholly or in part of the benefit of his franchise, it was sufficient to look at the sequence of events and thus conclude that, but for the scheme operated by the Ministry and the society, pigs live or dead which went direct to the society's premises would or might have found their way to the respondents' market. This means nothing less than that any act which may result in a loss to the market owner is an injury to him: it leaves no room for the damnum absque injuria which is a commonplace in a trading community: and it is in fact a proposition of law for which there is no foundation. If it was well founded, no shopkeeper or indeed any private person could buy or sell any marketable article within market limits: a view at one time held, at least in regard to sales on market days, but long since discarded: see *Mayor of Macclesfield* v. *Chapman*,[8] and see, too, *London Corporation* v. *Lyons, Son & Co. (Fruit Brokers) Ltd.*,[9] and particularly the observations of Maugham L.J. My Lords, I do not doubt that the general proposition for which the respondents contend must be qualified by saying that a sale outside the market which has or may have the effect of depriving the market owner of toll or some other advantage is an actionable disturbance only if the person selling takes or seeks to take the benefit of the market. That is clearly a "fraud upon "the market." The market owner provides the facilities and attracts the concourse. Whoever takes advantage of that concourse cannot fairly avoid paying his proper dues. I know of no case in which (apart from rival market cases) this has not been an essential element either express or implied. It may take many forms: e.g., where a cattle dealer leaves his sheep outside the market but goes to the market to find customers whom he takes outside and there sells his sheep to them (see *Bridgland* v. *Shapter*[10]), or by selling by sample in the market in order to evade paying toll on the bulk (see *Bailiffs of Tewkesbury* v. *Bricknell*[11]), or by intercepting goods on the way to market (see *Turner* v. *Sterling*,[12] and, to cite a modern case, *Loughrey* v. *Doherty*[13]). Always the underlying assumption is that, but for the act complained of, the producer would have paid toll or other dues in the market and that the intention of the act was to evade such payment.

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[7] [1936] Ch. 78.

It is impossible, in my opinion, to bring this law of the market into relation with the circumstances of the present case. It may well be that, if there had been no Pig Marketing Board, no war, no Defence Regulations, no Statutory Rules and Orders made under them, no Ministry of Agriculture, no new abattoir and other plant, the respondents' market in pigs alive or dead would have continued to flourish. It is possible to feel some regret that the market owners have suffered without compensation the loss of their market. But it is not the necessary consequence that the society or Ministry have been guilty of an actionable disturbance. They would admit, for it is clear from the correspondence, that they did not fail to foresee that one of the results of the new régime would be that toll would not be payable upon the pigs delivered to the society's premises, but it would be extravagant to suggest that the object of the scheme was to evade toll or that at any stage of it the producers, the Ministry, or the society got the benefit of the market without paying the proper dues. It was to the Ministry alone that the producer could sell live pigs for slaughter. Why should he send them to a market where there was no concourse of buyers and, if there had been, not one of them could buy? And how did the Ministry disturb the market when they sold the pigs to the licensed curer of their choice? No satisfactory answer was or could be given to these questions. Nor was a better answer given in respect of the carcases that were sold direct to the society by the producers. The claim that such sales were a disturbance of the market is, as I have already pointed out, tantamount to saying that no trader within the market limits can at any time buy a marketable article except in the market—a proposition that cannot be supported.

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[8] (1843) 12 M. & W. 18.
[9] [1936] Ch. 78.
[10] (1839) 5 M. & W. 375.
[11] (1809) 2 Taunt. 120.
[12] (1672) 2 Vent. 25.
[13] [1928] I.R. 103, 117.

I need say nothing about the conspiracy claim. It follows from what I have said that it must fail.

In my opinion, therefore, the appeal must be allowed with costs and the cross-appeal dismissed with costs. The respondents (the cross-appellants) must pay the costs of the appellants in the Court of Appeal and in this House, and the order of Curran J., including his order as to costs, so far as it affects the parties to this appeal, should be restored.

LORD REID. My Lords, I entirely agree with what has been said by my noble and learned friend Lord Simonds, and I only add a few observations because we are differing from the Court of Appeal in Northern Ireland. I need say nothing about the position before 1948: the changes then made by the appellants, the society and the Ministry, were the cause of the present action being raised against them. The trade in pig carcases in the respondents' market ceased as a result of those changes and the question is whether the actions of the appellants in that year were or were not legitimate.

The first contention of the respondents is that the appellants' actions amounted to levying a rival market at the society's premises. So it seems to me that the first thing to do is to see what happened at those premises. The Ministry, who were the sole buyers of live pigs for slaughter, set up a collecting centre there by agreement with the society, and large numbers of pigs were brought there. Some were brought by carriers engaged by the Ministry to collect them from farms, and some were brought or sent by the farmers. But no bargaining took place there. The price at which and the terms on which the Ministry bought had been published and were not subject to variation, and the position was similar with regard to pig carcases sold to the society and delivered there. The public were not invited to come there: the only members of the public invited to come were persons who had live pigs or carcases for sale and who chose to bring them there or persons who the sellers engaged to take their pigs or carcases there. Those pigs or carcases were generally if not always brought at pre-arranged times and there was no concourse of people there: if two or more persons bringing pigs happened to arrive at the same time I do not think that that could be described as a concourse of sellers. I am assuming that the property in the pigs and carcases had not passed until they were delivered, although I think that it had. Even if there could be a rival market without a concourse of buyers and sellers there must at least be activities in the "rival market" which bears some resemblance to the activities in an ordinary market and here I can see none. At best for the respondents all that happened was that a number of sellers arrived in succession and delivered their pigs or carcases, the property in which then passed to the Ministry or the society.

Then the respondents contended on more general grounds that the appellants' activities amounted to disturbance of their market. In a sense they did because it may well be that if the changes made in 1948 had never been made the trade in their market would have continued. But that is not what is meant by disturbance of a market as an actionable wrong. In general a person commits no tort if he buys goods which the seller might otherwise have sent to market. What he is not entitled to do is to take advantage of the concourse of the market. Typical examples are intercepting a seller on the way to the market and buying the goods before they reach the market, or going into the market to find a buyer who will come out and buy goods outside the market. It might be difficult in some cases to decide whether a person had taken advantage of the concourse, but in this case it appears to me to be impossible to say that the appellants took any such advantage. Their operations could have been conducted in exactly the same way if there had never been a market.

LORD TUCKER. My Lords, I agree that the appeal be allowed and the cross-appeal dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM. My Lords, I agree. I think the learned Lord Chief Justice would have reached the same result if he had not thought that the society's premises were a place of public resort in respect of what he regarded as the sale there of live pigs and pig carcases by the producers.

The transactions completed there he distinguished from the sales of pigs on the producers' farms which he held were private sales on private premises whereas the transactions on the society's premises he held were not. He seems to regard the producers as public resorting to the society's premises and constituting a concourse of sellers, which in his view distinguishes the two cases. The matter cannot, I think, be so regarded. The society's premises are, in my view, as much private premises as is the shop of a shopkeeper, and though, as *Goldsmid's* case [14] shows, a rival market may be set up in private premises, the coming of sellers to the society's premises with a commodity in which the Ministry or the society trades does not seem to me to be distinguishable from a stream of purchasers coming to a shop to buy the commodities in which the shopkeeper deals. In neither case is there a concourse of buyers and sellers. There is merely a succession of persons who come with a predetermined object to buy from, or sell to, a particular individual and depart when that object has been accomplished. I doubt if it is right to regard the buyers in the one case as a concourse of buyers and the sellers in the other as a concourse of sellers. So far as I have observed from the cases the phrase "a concourse of "buyers and sellers" seems to be used as a coming together of buyers and sellers, a concourse of both, not separate concourses of each. "Concourse," in any event, does not seem to me to be an apt word to apply to persons who are not gathered together in one place for a common purpose, but who come independently and at their own convenience to particular premises with the object of buying from, or selling to, the occupier of these premises. In my opinion the arrangements and transactions of the Ministry and the society present none of the essential features of a market. *Goldsmid's* case [15] was a clear case of a concourse of buyers and sellers, but there is some indication, particularly in the judgment of Cotton L.J., that if the acts complained of had been solely the acts of the tenants of the railway company the decision might have been different. If the argument for rival market fails, a claim for any other kind of disturbance must, in this case, in my opinion, also fail.

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[14] 9 App.Cas. 927; 25 Ch.D. 511.

Lord Somervell of Harrow. My Lords, Lord MacDermott held that in cases where the contract of sale was made on the farms no advantage was taken of the market and no tort was committed. This was the position, in his view, when pigs were collected by the advertised transport facilities.

Where pigs were delivered by the producers at the society's premises he held (1) that the contract was not completed until delivery at the society's premises, and (2) that the sales were therefore tortious in that the invitation to sellers to sell at the society's premises constituted a rival market.

I think that in those cases the contract may have been concluded at an earlier stage, but in any case I am unable to regard the invitation to producers to bring their pigs to be purchased by the Minister at the society's premises as constituting those premises a rival market.

A market is a place to which sellers who have not found buyers take their goods in the hope of finding buyers and to which buyers resort in the hope of finding the goods they want. If a seller has found a buyer or buyers, or a buyer has found the goods he wants in the hands of one or more sellers there is no need for either side to resort to the market. The word "concourse" is ambiguous. The suggestion that an invitation to sellers in a market area might be a tort would be very far-reaching. It is common for a trader to advertise the fact that he is a willing purchaser of old iron, fruit, or vegetables, etc. If as a result goods are sold to him direct which previously went through the market, no tort is, in my opinion, committed against the holder of the market.

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[15] 9 App.Cas. 927.

This, I think, disposes of the claim so far as it relates to purchases by the Minister. The Minister having bought the pigs had only one buyer to whom he wished to sell, the society. I agree with Lord MacDermott that these sales were not torts as against the plaintiffs. The seller had found his buyer and had no need to take his goods to market.

There is a proviso to the above general principles in that a man may commit the tort of disturbing market rights if he takes advantage of the market in order to find a buyer, or goods which he wants to buy. A simple case is that of a buyer who waits for and buys an animal on its way to the market. In the present transactions it seems to me that no advantage was taken of the market. Everything would have happened as it did if there had been no market in Enniskillen and previous sales had been done direct between producers and curers.

For these reasons I would allow the appeal and dismiss the cross-appeal, and I agree with the order suggested by my noble and learned friend on the Woolsack.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Linklaters & Paines for the Chief Crown Solicitor for Northern Ireland; Stephenson, Harwood & Tatham for E. C. Ferguson, Enniskillen.*

J. A. G.

[HOUSE OF LORDS.]

CHAPPELL & CO. LTD. AND ANOTHER . . APPELLANTS;

AND

NESTLE CO. LTD. AND ANOTHER . . . RESPONDENTS.

H. L. (E.)*
1959
April 27, 28, 29;
June 18.

Copyright—Infringement—Musical work—Gramophone records—Distribution for cash price to members of public sending chocolate wrappers—Whether sale "by retail"—"Ordinary retail selling price"—Meaning—Copyright Act, 1956 (4 & 5 *Eliz.* 2, *c.* 74), *s.* 8—*Copyright Royalty System (Records) Regulations,* 1957 (*S.I.* 1957, *No.* 866), *para.* 1.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

H. L. (E.)

1959

CHAPPELL & Co. LTD. *v.* NESTLÉ Co. LTD.

The H. Co. manufactured and sold to the N. Co., who were manufacturers of milk chocolate, a number of gramophone records of a work which was "musical" within the meaning of the Copyright Act, 1956, and the copyright of which belonged to the appellants. The recording was made on a thin film of cellulose acetate adapted for mounting on cardboard discs which were supplied by the N. Co. and bore matter advertising their chocolate, the price charged to the N. Co. being fourpence per record. The N. Co. advertised the records for sale to the public at the price of 1s. 6d. each, but with a stipulation to the effect that intending purchasers must in respect of each record send, in addition, three wrappers from sixpenny packets of their milk chocolate. The company made a profit on each transaction. The wrappers when received were worthless and were thrown away.

By a motion, which was treated by consent as the trial of the action, the appellants sought to restrain the two companies from manufacturing and selling the records on the ground that the transactions involved breaches of copyright in that in the circumstances they were not protected by the provisions of section 8 of the Copyright Act, 1956 [1]:—

Held, (1) that for the purpose of section 8 of the Copyright Act, 1956, the transactions in question were sales by retail.

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[1] Copyright Act, 1956, s. 8: "(1) "The copyright in a musical work is "not infringed by a person (in this "section referred to as 'the manufacturer') who makes a record of "the work or of an adaptation thereof "in the United Kingdom, if—(*a*) "records of the work, or, as the case "may be, of a similar adaptation of "the work, have previously been "made in, or imported into, the "United Kingdom for the purposes of "retail sale, and were so made or "imported by, or with the licence of, "the owner of the copyright in the "work; (*b*) before making the record, "the manufacturer gave to the owner "of the copyright the prescribed "notice of his intention to make it; "(*c*) the manufacturer intends to sell "the record by retail, or to supply it "for the purpose of its being sold "by retail by another person, or intends to use it for making other "records which are to be sold or "supplied; and (*d*) in the case of a "record which is sold by retail, the "manufacturer pays to the owner of "the copyright, in the prescribed "manner and at the prescribed time, "a royalty of an amount ascertained "in accordance with the following "provisions of this section. (2) Subject to the following provisions of "this section, the royalty mentioned "in paragraph (*d*) of the preceding "subsection shall be of an amount "equal to 6¼ per cent. of the ordinary "retail selling price of the record, "calculated in the prescribed manner: "Provided that, if the amount so calculated includes a fraction of a "farthing, that fraction shall be "reckoned as one farthing, and if, "apart from this proviso, the amount "of the royalty would be less than "three-farthings, the amount thereof "shall be three-farthings."

The Copyright Royalty System (Records) Regulations, 1957: "1 (1) "The notice required by subsections "(1) and (5) of section 8 of the Act "shall contain the following particulars . . . (*f*) the ordinary retail "selling price (as hereinafter defined) "of the records, or, where it is intended to reproduce the work on "more than one type of record, the "ordinary retail selling price of each "type of record the manufacturer intends to make and the amount of "the royalty payable on each record. ". . . 3: The ordinary retail selling price of any record shall be

(2) (Viscount Simonds and Lord Keith of Avonholm dissenting), that part of the consideration for the sale of the records was the acquisition and delivery of the wrappers; that section 8 contemplated that the "ordinary retail selling price" would be a money sum only, constituting the entire consideration for the sale, and that, accordingly, the respondent companies' operations were not within the ambit of the section, and there was, therefore, infringement of the appellants' copyright.

Per Viscount Simonds and Lord Keith of Avonholm. The wrappers formed no part of the selling price, but their production was merely a qualification for purchasing records.

Decision of the Court of Appeal [1958] Ch. 529; [1958] 2 W.L.R. 657; [1958] 2 All E.R. 155 reversed.

APPEAL from the Court of Appeal (Jenkins and Ormerod L.JJ., Romer L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated March 19, 1958, who allowed an appeal from an order of Upjohn J. dated November 14, 1957, restraining the respondents, the Nestlé Co. Ltd. and Hardy Record Manufacturing Co. Ltd., from infringing the copyright in a musical work entitled "Rockin' "Shoes" under the copyright in which an exclusive licence had been granted to the first appellants, Chappell & Co. Ltd., by the second appellants, Winneton Music Corporation. The facts shortly stated were as follows:

The Hardy Record Manufacturing Co. Ltd., the second respondents, made gramophone records consisting of thin films of cellulose acetate. They entered into an agreement with the first respondents, the Nestlé Co. Ltd., who were manufacturers of milk chocolate, to supply them with a number of records of a dance tune called "Rockin' Shoes," the copyright of which was vested in the first appellants, Chappell & Co. Ltd., as sole licensees and in the second appellants, the Winneton Music Corporation, as owners. The price to Nestlé of the records was fourpence; they were mounted on cardboard discs supplied by Nestlé containing advertising matter. Nestlé sold the records to the public at the price of 1s. 6d., subject to a condition that the purchaser must also send three wrappers from their sixpenny milk chocolate bars. These wrappers were of no value in themselves and were thrown away when received. Nestlé made a profit on

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"calculated at the marked or cata- "logued selling price of single records "to the public, or if there is no such "marked or catalogued selling price, "at the highest price at which single "records are ordinarily to be sold to "the public, exclusive of purchase tax "in either case."

each sale, but the purpose of the scheme was to advertise and promote the sale of their milk chocolate.

The Hardy company gave notice of their intention to manufacture, in accordance with section 8 (1) (*b*) of the Copyright Act, 1956, stating 1s. 6d. to be the ordinary retail selling price, and offered to pay royalties, which the appellants refused. In the action the appellants (the plaintiffs) alleged that these transactions constituted a breach of copyright, as they did not involve a sale " by retail " within the meaning of the section. An interlocutory motion for an injunction was treated, by consent, as the trial of the action. At the hearing of the motion Upjohn J. gave judgment for the appellants. The Court of Appeal by a majority (Jenkins and Ormerod L.JJ., Romer L.J. dissenting) reversed that decision.

K. E. Shelley Q.C. and *P. Stuart Bevan* for the appellants. The questions on this appeal are: (i) Do the facts as set out above constitute the supply of a record " for the purpose of its " being sold by retail " within the meaning of those words in section 8 (1) (*c*) of the Copyright Act, 1956? (ii) Was the notice of intention to manufacture given by the second respondents, the Hardy Record Manufacturing Co. Ltd., a valid notice having regard to the requirement under regulation 1 (1) (*f*) of the Copyright Royalty System (Records) Regulations, 1957, to state the " ordinary retail selling price " (as defined in regulation 3), that is, in the circumstances set out above, was there any ascertainable " ordinary retail selling price " or any selling price of records " to the public "?

The history of this branch of the law of copyright is as follows. It was decided in *Boosey* v. *Whight*[2] that perforated discs forming parts of a mechanical contrivance whereby musical sounds could be reproduced did not infringe the composer's copyright under the Copyright Act, 1842. In consequence of that decision a very large industry in gramophone records and other mechanical contrivances for the reproduction of musical works was built up. In 1910 the opposing interests of this industry and of composers was considered by a parliamentary committee. Under the Copyright Act, 1911, a copyright owner could prevent altogether the manufacture of mechanical contrivances by which his work could be performed, but by section 19 it was provided that if the copyright owner granted to any person a licence to make such mechanical contrivances, any other person automatically had the right to make such contrivances on giving a prescribed notice and paying a prescribed royalty. Section 8 of the Copyright Act, 1956, has substantially retained this principle, subject to the important modifications that the original permitted records must have been for the purposes of retail sale and the right to other persons to make records, once permission has been given to one manufacturer, is only for the purpose of the record being sold by retail.

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[2] [1900] 1 Ch. 122.

As to the first point set out above, the appellants submit that as under section 8 (2) the royalty is to be calculated on "the "ordinary retail selling price of the record," the word "retail" in the expressions "sell the record by retail" and "for the "purpose of its being sold by retail" must refer only to an ordinary retail sale, that is, having the normal characteristics of a retail sale of the commodity in question, namely, records. These characteristics include the following: (a) The total consideration moving from the purchaser is an ascertainable money price. (b) No conditions with which the purchaser must comply before he can effect a purchase are attached to the sale. (c) The sale of the record must be an independent transaction, complete in itself, and unconnected with the sale or purchase of any other article or commodity.

Section 8 is not concerned with any contrast between a wholesale sale and a retail sale. Paragraph (*d*) of section 8 (1) does not postulate that the ultimate seller of a record shall be in contractual relationship with the manufacturer. The reason for the emphasis of the word "retail" is that, in order that the protection given by the section might apply, there must have been, in each case, a sale of a record by retail, and, therefore, it is convenient that the royalty payable should be assessed on the retail price.

As to the second point, the kernel of the matter is: are the three wrappers, which have to be tendered by the customer before he can obtain a record, part of its selling price? Upjohn J. and Romer L.J.[3] accepted the appellants' submission that the wrappers represent something of value to Nestlés, that the owner of the copyright is entitled, under section 8, to a royalty based on the full purchase price of each record sold by retail, and that, since the copyright owner receives a royalty assessed upon the cash part only of each sale, the provisions of section 8 have not been complied with.

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[3] [1958] Ch. 529, 548.

On the other hand, Ormerod and Jenkins L.JJ.[4] took the view that the possession of three wrappers represented the necessary qualification of entry to the class of persons who alone were entitled to a record for 1s. 6d. But that is a very artificial way of looking at this question. It may be asked, why should Nestlés wish to create a restricted class of persons entitled to a record? The motive for the scheme is surely relevant. It is submitted that the creation of the "class" is simultaneous with the acceptance of 1s. 6d. Once the record has been dispatched on receipt of 1s. 6d. and three wrappers, which are then destroyed, the purchaser is demoted from the "class," he is disqualified and, if he wishes to obtain a further record, he must begin again by getting three more wrappers. The whole transaction is, in effect, a double sale and is the very antithesis of an ordinary retail sale. It follows that the notice was defective in that regulation 1 (1) (*f*) of the statutory regulations was not complied with, for it is impossible in the circumstances for the manufacturer to state the "ordinary retail selling price" of the records. The appellants concede that if a shopkeeper were to sell a line of goods at lower than their ordinary market price, or even at a loss, in order to attract customers into his shop, such a sale would be a perfectly valid transaction for the purposes of section 8. The reason is, that there is no condition imposed on the would-be customer to buy any other goods displayed in the shop, although, of course, the shopkeeper hopes that by means of this device the customer will be persuaded so to do.

It is plain that not every sale of a record comes within section 8. Take this example: suppose a man decides to give a novel form of Christmas present to certain members of his family. He has a daughter, who is having singing lessons, and he arranges with a recording company for her to record a popular song which is the subject of copyright. The father subsequently sends copies of this record to the family as presents. There has not been a "sale" within the meaning of section 8, although, in one sense, there has been a "sale" by the manufacturer. Paragraph (*c*) of section 8 (1) is complied with if the manufacturer supplies records wholesale, provided some person into whose hands the records will come intends to sell the records by retail. Every record is intended to come into the hands of an ultimate user. Therefore, if "sale by retail" merely means sale to an ultimate user, paragraph (*c*) would always be complied with if the record was sold. Section 8 is designed to cover all ordinary sales but not special sales or " stunts " such as the advertising campaign here in question. The majority of the Court of Appeal in coming to their decision have overlooked the second sentence of section 8 (1) (*c*): the manufacturer intends " to supply the record . . . " for the purpose of its being sold retail by another person . . ."

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[4] [1958] Ch. 529, 537, 544, 545.

The respondents contended below that under the general law a work once published is free to the public, and that, since the Copyright Acts restrict that freedom and impose penalties for infringement, they should be construed so as not to restrict the public more than necessary. The appellants' answer is that copyright is a product of the common law, and that as section 8 is an enabling section and not a restrictive section, that is, its effect is to make an exception to the broad right of copyright, it should in consequence be construed narrowly against the manufacturer.

As to the meaning to be attributed to the words " retail sale " in section 8, *G. J. Dawson (Clapham) Ltd.* v. *H. & G. Dutfield*[5] is of no assistance and is distinguishable as being a case of the sale of second-hand goods. *Turpin* v. *Middlesbrough Assessment Committee*[6] is also unhelpful, for that decision turned on the precise words of the relevant statute, which are quite different from those of the Copyright Act, 1956. In that case the question was whether a garage and motor repair depot was a " retail " shop," and the references to " retail trade " in that connection can have no possible bearing on the construction of section 8 of the Act of 1956.

In conclusion, it is emphasised that the price of a record is 1s. 6d. plus an indeterminate " x," to adopt Jenkins L.J.'s[7] paraphrase of the appellants' submission on this question. Once that position is reached, the transaction is not a sale at an ascertainable money price, and, accordingly, it is not a sale within the meaning of section 8 of the Act of 1956.

Guy Aldous Q.C. and *John Whitford* for the first respondents. The primary question is what is meant, for the purposes of section 8 (1) of the Copyright Act, 1956, by the words " sale by " retail." Do they mean a sale to the public, or to the consuming customer, or do they mean an " ordinary retail sale " as defined by the appellants? In general, it is submitted that the section cannot be construed with reference to subsequent regulations made thereunder. Paragraph (*a*) of section 8 (1) contains the words "retail sale," and paragraph (*c*) the words "sell the "record by retail." Both those expressions must have a similar meaning and be construed in the same sense. Accordingly, if the word "ordinary" is to be read into the subsection at all, it must be read into paragraphs (*a*) and (*c*).

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[5] [1936] 2 All E.R. 232.

[6] [1931] A.C. 470; 47 T.L.R. 308.

[7] [1958] Ch. 529, 544.

It is submitted that under section 8 (1) (*b*) and (*c*) a manufacturer wishing to sell his records to a wholesaler must give the prescribed notice before any records are sold. If that is done he is not guilty of infringement whatever the wholesaler or retailer does with the record thereafter.

If the appellants' contention as to the meaning to be attached to the words "sale by retail" be correct, then it must lead to results which, in the respondents' submission, are plainly unreasonable and which would further be contrary to the very interests of the copyright owners which it is in part the object of the section to protect. It is to be observed that a work made pursuant to the provisions of section 8 and in compliance with the formalities therein described is not an infringing work. Royalty is not payable on manufacture, but only becomes due and payable under section 8 (1) (*d*) when the record is "sold by "retail." If a record is made by a manufacturer in the normal course of business and with an intention to supply it for the purpose of sale by retail, and if the proper notice is given specifying the ordinary retail selling price and otherwise conforming with the provisions prescribed by section 8, then such record, when made, in the hands of the manufacturer or any retailer or any other person, is not an infringing work. If the appellants' contention be right and some retailer subsequently sells such a non-infringing record subject to a condition upon sale, or to some limited class of qualified purchasers, then such sale would not be a "sale by retail," with the consequence that a copyright owner would not be entitled to claim any royalty in respect of such sale and at the same time would be unable to allege that his copyright had been infringed.

The words "ordinary retail selling price" in section 8 (2) do not mean the price paid on ordinary retail sales but the *ordinary price paid on retail sales*. This provision that royalty shall be calculated on the "ordinary" retail selling price as above defined is inserted to ensure that the return to the copyright owner is not diminished in cases where certain of the records are, for example, disposed of at cut prices. It is to be observed that section 8 (1) (*d*) provides for payment of royalty only subsequent to sale. Section 8 (2) is thus designed to ensure that, when a sale takes place, the royalty is in fact paid on the basis of the normal selling price, the catalogue price, and not upon any exceptional price paid in exceptional circumstances. It was not the intention of the legislature to exclude from the payment of royalties transactions which are not "ordinary retail sales" within the meaning given to that phrase by the appellants.

A "sale" in this connection includes any transaction in which the consideration for the transfer of the property in the goods consists partly of money and partly of other valuable property: see *Sheldon* v. *Cox*[8] and Chalmers' Sale of Goods, 10th ed., pp. 5 and 6. A "retail sale" is properly defined in section 41 of the Finance (No. 2) Act, 1940, where it states that "'selling "'by retail' means selling goods by way of business otherwise "than by wholesale . . ." That definition accords with the view of Viscount Dunedin in *Turpin* v. *Middlesbrough Assessment Committee*[9] that it is a sale to the consuming customer.

As to the regulations, they cannot govern the construction of the Act. [Reference was made to regulations 1, 2 and 3.] There is nowhere to be found any provision which gives the regulations the force of a statute: see sections 8 (11) and 47 of the Copyright Act, 1956. The phrase "ordinary retail selling price" in regulation 3 is a reference back to the provisions of section 8 (2) of the Act. In the present case the catalogue price is the price of 1s. 6d. specified on the back of the record. The wrappers are of no value and form no part of the price of the record at all. So far as the purchase of *wrappers* is concerned, it has never been suggested that the money paid for the chocolate was not the full price of the chocolate. Further, it is not suggested that any part of the 1s. 6d. paid for a record is payment for chocolate. "Price" in this connection is the fixed marked price; any personal element is irrelevant, that is to say, that the test of price is an objective test. Thus, if two persons each buy three 6d. bars of Nestlé's chocolate, and one of them wants a record and the other does not, the price of the record to the person who wants it is 1s. 6d., no more, no less; the *value* of the record to *him* is irrelevant.

On the question whether the wrappers form any part of the price of the record, it is to be observed that a contract for the purchase of chocolate is plainly a transaction within section 1 (1) of the Sale of Goods Act, 1893, and the consideration is plainly 6d. per bar of chocolate. Once the price has been paid and the chocolate in its wrapper handed over, then the consideration for that price is past, and that past consideration cannot found any further consideration for any subsequent contract. Accordingly, if a purchaser of Nestlé's chocolate sends three wrappers, together with 1s. 6d., for a record, no part of the consideration for the chocolate and wrappers can form part of the consideration for the record, for it is a past consideration, and in this connection no valid distinction can be made between persons who buy chocolate with knowledge of Nestlé's scheme and those who buy without such knowledge.

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[8] (1824) 3 B. & C. 420.

[9] [1931] A.C. 470, 473.

It is no doubt true that the persons who buy a record at the marked price of 1s. 6d. are a limited class, namely, those persons who forward three wrappers. Those wrappers are admittedly of no value; they are wrappers to bars of chocolate the full purchase price of which has been paid by someone. But the limitation of a sale to certain persons does not mean that it is not a retail sale to the public like any other sale to the public where a condition is imposed, for example, sales by a co-operative society to members only. In all these cases the "price" paid is the sum of money handed over by the purchaser in exchange for the goods in question.

Before the Copyright Act, 1911, it was not an infringement of the copyright in a musical work to make a record by means of which such work could be mechanically performed. But the effect of the Copyright Acts of 1911 and 1956, so far as is material, has been to prevent any person from manufacturing records of a copyright work without the copyright owner's consent, unless such person could bring himself within section 19 of the Act of 1911 or section 8 of the Act of 1956. The courts will not, unless forced to do so, construe widely Acts which take away public rights: see *Walsh* v. *Secretary of State for India*[10] and *David* v. *De Silva*.[11] Accordingly, the respondents submit that it is to be presumed that the legislature did not intend to restrict the activities of manufacturers of records more than is expressly stated in the Acts, and that, therefore, if there is any doubt as to the meaning of section 8 (which should be read in conjunction with section 19 (2) of the Act of 1911 (see Maxwell on Interpretation of Statutes, 9th ed., p. 165)), such doubt should be resolved so as to restrict manufacturers of records as little as possible. Further, under the Copyright Acts of 1911 and 1956 (sections 11 and 21 respectively), if there is an infringement by a manufacturer of records, it may involve penal consequences, and in such case it is even more important that any doubt upon construction should be resolved in favour of the manufacturer.

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[10] (1863) 10 H.L.C. 367.

[11] [1934] A.C. 106; 50 T.L.R. 165.

Whitford following. The appellants contend that section 8 of the Copyright Act, 1956, only protects ordinary retail sales of records and that the acts of the respondents are not such sales and are consequently infringements of the appellants' copyright. It is to be observed that the word " ordinary " is used in section 8 (2) in relation to the " selling price." It is submitted that in relation to the phrase " ordinary retail selling price " the word " ordinary " qualifies " price " and " price " alone, and it has no relation to the retail sale contemplated by section 8 (1). So far as section 8 (1) is concerned, there is no mention of the word " ordinary " in relation to a retail sale at all. If the legislature had contemplated a special category of " retail sales," namely, an " ordinary retail sale," nothing could have been easier than for the legislature to have inserted the word " ordinary " into subsection (1). " Section 8 (1) (*c*) refers to the selling of " the record ' by retail ' simpliciter, with no superadded require- " ment to the effect that the sales referred to must be retail sales " in the ordinary course of business ": *per* Jenkins L.J.[12] Any other construction of section 8 would place a manufacturer in the greatest difficulty, for if it is only certain sales to the public which come within the protection of the section, what guidance does the section afford him?

The appellants further contend that the notice purporting to be given by the respondents pursuant to the Copyright Royalty System (Records) Regulations, 1957, was defective in that there was no " ordinary retail selling price," and that therefore the price stated in reference to regulation 1 (1) (*f*) was not the ordinary retail selling price. The regulation envisages the marked price as being conclusive for the purposes of the regulations: see regulation 3. It was done in that way because it was presumed that that would be the price the public would be prepared to pay, and, therefore, the royalty is based on that price. It follows that, if a retailer sells a record at a price greater than the marked price, the copyright owner is nevertheless entitled only to the royalty based on the marked price.

John Cope, for the second respondents, adopted the arguments advanced on behalf of the first respondents.

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[12] [1958] Ch. 529, 545.

Shelley Q.C. in reply. The cards on which the records are mounted contain, inter alia, the information that a record can be obtained by sending to Nestlé's 1s. 6d. together with three wrappers. That is stating as clearly as possible that part of the consideration for a record is three wrappers. The question arises why do Nestlé's want the wrappers? The answer is, because they have some value to Nestlé's. If this were not so, Nestlé's would supply a record without the requirement for wrappers. It follows that the whole of the price is not stated as prescribed by section 8, and the provisions of the section have therefore not been complied with.

By section 2 (5) of the Act of 1956 there is granted to the copyright owner a monopoly in the reproduction of his work, for example, by records (see section 48). That is a restrictive provision and if doubt arose as to its true construction it is conceded that it should be resolved in favour of an alleged infringer. But that is not this case. Section 8 is an exception to the general grant of copyright, and, therefore, if it is alleged that its provisions have been infringed, it should be read narrowly, that is, in case of doubt in favour of the copyright owner.

The words "ordinary retail selling price" in regulations 1 (1) (*f*) and 3 connote an ordinary sale at an ordinary price. In the present case the conduct of the sale of these records has not been ordinary, because there has been an advertising scheme to advance the sale not of records but of chocolates. From the sale of a record there accrues to Nestlé's an advantage other than the payment of 1s. 6d. Accordingly, the regulations have not been complied with, because the "ordinary retail selling price" as defined above has not been properly stated on the notice the manufacturer has to give to the copyright owner. In these circumstances it is impossible to say that the manufacturer has given the prescribed notice under section 8 (1) (*b*), and therefore he has not brought himself within the protection of section 8, and there has been an infringement.

Their Lordships took time for consideration.

1959. June 18. VISCOUNT SIMONDS. My Lords, this appeal raises a question of construction of the Copyright Act, 1956, upon which there has been a difference of opinion in the courts below, the Court of Appeal by a majority (Jenkins and Ormerod L.JJ., Romer L.J. dissenting) having reversed the decision of Upjohn J.

The facts are not in dispute and the action was tried without pleadings upon an interlocutory motion which by consent was treated as the trial of the action. The appellants Winneton Music Corporation are the owners, and the appellants Chappell & Co. Ltd. their exclusive licensees, of the copyright in a musical work entitled "Rockin' Shoes." The question is whether the respondents the Nestlé Co. Ltd. and Hardy Record Manufacturing Co. Ltd. (whom I will call "the respondents Nestlé" and "the respondents Hardy") have infringed this copyright. It is common ground that they have done so unless they are protected by section 8 of the Copyright Act, 1956. I will therefore set out that section and then state such further facts as appear to be relevant. Section 8 is as follows:

> "8.—(1) The copyright in a musical work is not infringed "by a person (in this section referred to as 'the manu-"'facturer') who makes a record of the work or of an "adaptation thereof in the United Kingdom, if—(*a*) records "of the work, or, as the case may be, of a similar adaptation "of the work, have previously been made in, or imported "into, the United Kingdom for the purposes of retail sale, "and were so made or imported by, or with the licence of, "the owner of the copyright in the work; (*b*) before making "the record, the manufacturer gave to the owner of the "copyright the prescribed notice of his intention to make it; "(*c*) the manufacturer intends to sell the record by retail, "or to supply it for the purpose of its being sold by retail "by another person, or intends to use it for making other "records which are to be so sold or supplied; and (*d*) in the "case of a record which is sold by retail, the manufacturer "pays to the owner of the copyright, in the prescribed "manner and at the prescribed time, a royalty of an amount "ascertained in accordance with the following provisions of "this section. (2) Subject to the following provisions of this "section, the royalty mentioned in paragraph (*d*) of the pre-"ceding subsection shall be of an amount equal to six and "one-quarter per cent. of the ordinary retail selling price of "the record, calculated in the prescribed manner: Provided "that, if the amount so calculated includes a fraction of a "farthing, that fraction shall be reckoned as one farthing, "and if, apart from this proviso, the amount of the royalty "would be less than three-farthings, the amount thereof "shall be three-farthings."

The Copyright Royalty System (Records) Regulations, 1957, were made under the Act, of which I think it necessary only to mention regulation 1 (1) (*f*), which provides that the notice required by subsections (1) and (5) of section 8 shall contain the ordinary retail selling price (as thereinafter defined) of the records or, where it is intended to reproduce the work on more than one type of record, the ordinary selling price of each type of record the manufacturer intends to make and the amount of the royalty payable on each record, and regulation 3, which provides that the ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public or, if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily sold to the public exclusive of purchase tax in either case.

The respondents Hardy are manufacturers of records, the respondents Nestlé are manufacturers of chocolate. The respondents Hardy make use of a process by which a recording can be produced on a thin film of cellulose acetate at a cost enabling them to sell records at a wholesale price of 4d. each. By this process they have produced film records of the musical work " Rockin' " Shoes " and sold them to the respondents Nestlé mounted upon cards supplied by the latter. A film so mounted is sold by Nestlé to any member of the public who sends to them a postal order for 1s. 6d. with three wrappers from 6d. bars of Nestlé milk chocolate. A typical offer appeared in the " Daily Mirror " of September 11, 1957, in the words—" Here's how to get each new " stars record. Collect three sixpenny wrappers from Nestlé's " milk chocolate. Fill in the coupon and send it with a postal " order for 1s. 6d., the price of the record, and your three " wrappers. You may order as many records as you like on this " coupon, but for each record you must send three wrappers " and 1s. 6d. P.O., crossed, payable to the Nestlé Company, " Limited." Next to the script that I have cited was a coupon containing the names of a number of musical works including " Rockin' Shoes." All this was part of a full-page advertisement of Nestlé's milk chocolate and no one can doubt that Nestlé's interest in the sale of records was in order to promote the sale of their chocolate, but presumably they were not averse from making such profit as they seem to have made from the sale of records also. The film, as I have said, was mounted on a card supplied by Nestlé, whose name appears prominently upon it. On the back were the words—" Remember, all you have to do to get each new "stars record is to send three wrappers from Nestlé's sixpenny "milk chocolate bars together with postal order for 1s. 6d. and "stating which record you want to Nestlé Record Offer P.O. "Box 14 Hayes, Middlesex. Don't forget, three wrappers and "postal order for 1s. 6d."

Before, however, making or permitting a public offer such as I have referred to, it was necessary that the notice prescribed by section 8 of the Act should be served. This duty falls on the manufacturer, and accordingly the respondents Hardy entered into correspondence with the Mechanical Copyright Protection Society Ltd. who were, as I assume, acting on behalf of the appellants. In the first letter which passed between them, dated September 12, 1957, but referring to other musical works than "Rockin' Shoes," Hardy stated "the retail price of the record, "and they are being sold individually not collectively, is one shilling plus three wrappers. Wrappers are valueless and normally "thrown away." In the ensuing correspondence the society objected that the proposal made by Hardy did not constitute a sale by retail and that therefore the proposed records could not be made under the provisions of section 8 of the Act. Hardy nevertheless on July 17, 1957, proceeded in relation to "Rockin' "Shoes" to give a notice which purported to be the statutory notice. In it they said: "The ordinary retail selling price of each "record will be not greater than 8¾d. exclusive of purchase tax "and not greater than 1s. inclusive of purchase tax." By a subsequent letter those figures were amended to 1s. 1½d. and 1s. 6d. respectively. No mention was made of any wrappers. Nestlé then proceeded to put the proposal into effect and sold the record to members of the public who sent a postal order for 1s. 6d. together with three chocolate wrappers. Forthwith the appellants challenged the validity of their claim to be protected by section 8. Upjohn J. supported their contention and granted the appropriate injunction. The Court of Appeal, on the other hand, taking by a majority the view that the respondents had complied with the section, allowed the appeal and dismissed the action.

Faced by this conflict of opinion among learned judges, from any of whom I am reluctant to differ, I feel at liberty to say that I have found unusually great difficulty in reaching my own conclusion.

It appears to me that, in order to comply with the provisions of section 8 and thus obtain its protection, there are three relevant conditions to be satisfied by the manufacturer of an article which would otherwise be an infringement of copyright. By "relevant "conditions" I mean those conditions about which an issue arises in this case. First, there must be a "sale" of the article in question: secondly, the sale must be a "retail" sale: thirdly, it must be possible to predicate of it that there is an "ordinary "retailing selling price" of it, for if there is not, an essential part of the prescribed notice cannot be given.

Upon the first point I cannot feel any doubt. It had not been contended in the course of the case that there was not a sale, until during the debate in your Lordships' House that suggestion was made, and I think that, beyond doubt, anyone, who in answer to the advertisement acquired a record, would say that he had bought it and would be surprised that any doubt should be cast upon what he regarded as an obvious fact. Whether the consideration or the price that he paid was 1s. 6d. only or 1s. 6d. and three wrappers is a matter not for him but for your Lordships to determine.

Secondly, I think it is clear that the sale is a retail sale. It is a sale to a consuming member of the public and I know of no other factor which distinguishes a retail sale from other sales. Put negatively, it is not a sale wholesale to a purchaser who proposes himself to sell it retail. In considering this second point, I do not ignore the argument that in its context in the section "retail sale" means only what was sometimes called an "ordinary" retail sale, by which, as I understood, was meant a sale in which there was no other element than on the one side an article sold and on the other a payment of money made, and that the transaction was not an "ordinary" retail sale if the purchaser was required to produce three chocolate wrappers in addition to his postal order. This argument is so closely linked with the third condition that there must be an "ordinary retail selling "price" that I will consider the two points together.

I think, my Lords, that upon this last matter some confusion has arisen from treating the word "ordinary" as if it qualified "retail" rather than "price." If there is no retail sale, there can, of course, be no ordinary or other retail selling price. But given a retail sale, there is no difficulty in ascertaining the ordinary selling price upon such a sale. The problem, therefore, and the only problem, is whether there is a retail sale with a retail selling price within the meaning of the section. The contention that it is not is stated in various ways. Upjohn J., in a passage cited with approval by Romer L.J., said[1]: "The vital part of

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[1] [1958] Ch. 529, 548.

"this transaction is to get in three wrappers and that represents "a great deal of value to Nestlé's, because it is evidence of an "advertising campaign pushing up their sales. That is the value "to them. This bears no resemblance at all to the transaction "to which, in my judgment, the section is pointing, that is, an "ordinary retail sale with an ordinary retail selling price. I think "it is quite wrong to suppose that the retail selling price here is "1s. 6d. The purchaser has to purchase three bars of chocolate "and that is the real value of this transaction to Nestlé's." Romer L.J. himself states the proposition thus: [2] "I cannot "help thinking that the owner of the copyright was entitled, "under section 8, to a royalty assessed upon the full purchase "price of each record sold by retail. Under Nestlé's method "of selling them the copyright owner gets a royalty assessed upon "the cash part only of each sale, and he gets nothing in respect "of the consideration which, although indirect, passes from the "customers and is received by the company." There are here two somewhat different conceptions. First, the transaction is not such an ordinary retail sale as contemplated by the section, because the vendor gets something of value, viz., the evidence of an advertising campaign pushing up the sales: secondly, it is not within the section, because the vendor gets from the purchaser a consideration for the sale of the record which the copyright owner does not share, for it is not included in the retail selling price upon which the royalty is based. In the latter case the wrappers are treated as part of the consideration moving from the purchaser, in the former as evidence of a collateral advantage which has already accrued to the vendor. It is necessary to distinguish these two aspects of the matter. In the contention that the sale is not an ordinary retail sale and therefore not within the section because the vendor gets not only the cash price but also evidence of an advantage already accrued, I see no merit. It is irrelevant what is the vendor's motive for selling a record for 1s. 6d. if that is the selling price. It may be part of an advertising campaign for the sale of other goods: but there is nothing in the Act which impels me to read into the section a qualification that the selling price is to be disregarded and the article denied protection if the vendor's motive in fixing it is anything but to obtain the maximum amount commercially possible. The alternative view is that the production of three chocolate wrappers is part of the price of the record and that, as it is incapable of valuation, the

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[2] [1958] Ch. 529, 548.

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necessary particulars cannot be given and the statutory requirements satisfied. This view is to some extent supported by the fact that in the advertisement and offer, to which I have already referred, the postal order for 1s. 6d. and three wrappers are in one passage included in a single demand. But in the same document the postal order for 1s. 6d. alone is referred to as the price of the record. I cannot draw any safe conclusion from the documents: the question remains open whether the wrappers are part of the selling price.

In my opinion, my Lords, the wrappers are not part of the selling price. They are admittedly themselves valueless and are thrown away and it was for that reason, no doubt, that Upjohn J. was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the purchaser of the record, has in the past bought not from Nestlé's but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J.) the sale "bears "no resemblance at all to the transaction to which the section ". . . is pointing" or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction. What can be easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer's motive is his own advantage. It is possible that he achieves his object. But that does not mean that the sale is not a retail sale to which the section applies or that the ordinary retail selling price is not the price at which the record is ordinarily sold, in this case 1s. 6d.

An argument was addressed to the House by counsel on either side which appeared to be based on the difficulties that are likely to ensue if the one contention or the other is accepted. It may be so. It is probable that the draftsman of the Regulations foresaw some of them and did his best to avoid them. But these are not considerations that have weighed with me in interpreting the words of a section which appear to be written in plain English. Nor do I need to have recourse to the principle that since the Act takes away something heretofore of common right, it must be strictly and narrowly construed, nor to the principle that, since section 8 constitutes an exception upon a general grant, it is the exception which is to be narrowly construed. These are maxims to which it is necessary to have recourse as a last resort. In the present case, though I take a different view from your Lordships with great diffidence, I do not find it necessary to do so.

I would dismiss the appeal.

LORD REID. My Lords, the respondents, the Nestlé Co., manufacture chocolate, including wrapped bars of milk chocolate, which are sold to the public at 6d. per bar. As an advertising scheme to promote the sale of their chocolate they published advertisements in September, 1957, in which they offered to supply any one of six named gramophone records in return for a postal order for 1s. 6d. and three wrappers. The advertisement produced said: "Save the wrappers from 6d. blocks. They will "help you to get smash hit recordings of skiffle, calypso, swing "and ballad by Britain's newest stars all exclusive to Nestlés." Any member of the public could obtain as many records as he wished by sending 1s. 6d. and three wrappers for each record.

One of these records was a reproduction of a dance tune "Rockin' Shoes" of which the copyright belonged to the appellants the Winneton Corporation, the other appellants, Chappell and Co., being sole licensees under the copyright. The appellants maintained that the manufacture and sale of this record was an infringement of their copyright and they seek an injunction and damages. The respondents maintain that they were entitled to supply records in this way without the permission or licence of the appellants because they were authorised to do so by section 8 of the Copyright Act, 1956. The relevant part of that section is as follows: [His Lordship read section 8 (1) and (2) and continued:] Before dealing with these provisions it may be helpful to state briefly the history behind them and the steps which the respondents took to comply with them. Before 1911 it had been held that the reproduction of copyright musical works by mechanical means such as rolls for player pianos was not an infringement of copyright, and gramophone records had been manufactured on a considerable scale and sold without licence or payment of royalty. By the Copyright Act, 1911, it was enacted that copyright included the sole right to make any record or other contrivance by means of which a work might be mechanically performed. But it was provided by section 19 of the Act that making any such contrivance should not be an infringement if the maker, inter alia, gave the prescribed notice and paid royalties calculated in accordance with the section in respect of all such contrivances sold by him. The provisions of this section are broadly similar to the provisions of section 8 of the 1956 Act.

The respondents, the Hardy Co., operate a novel process whereby records which play for about 1¾ minutes are made on thin films of cellulose acetate. These films can then be suitably mounted and played in the ordinary way on gramophones. The process is inexpensive and the Hardy Co. sold to the Nestlé Co. a large number of these recordings at 4d. each. The Nestlé Co. then had them mounted on cardboard mounts which also carried advertisements for their chocolate.

The Hardy Co. informed the Mechanical Copyright Protection Society of the project in June, 1957. They said that the retail price of the records was to be one shilling plus 3 wrappers. This society stated that the proposal did not constitute a sale by retail and in consequence the proposed records could not be made under the provisions of section 8 of the Copyright Act, 1956: they further stated that they could not countenance the reproduction of their members' copyright music on records for the purpose of advertising the products of another company. After some correspondence the Hardy Co. gave a notice purporting to be under the 1956 Act and Regulations made under it. This notice included a paragraph: "F. The ordinary retail selling price of each record "will be not greater than 8¾d. exclusive of purchase tax and not "greater than 1s. inclusive of purchase tax." On July 25, 1957, these figures were altered to 1s. 1½d. exclusive of purchase tax and 1s. 6d. inclusive of purchase tax. The society maintained their views and the appellants now contend that this notice was not a valid notice under section 8 of the Act or the Regulations.

The scheme of section 8 appears to me to be clear. To avoid infringement four conditions must be complied with. Condition (*a*) limits the class of works for the reproduction of which the manufacturer can rely on this section and I need not further consider it: (*b*) requires notice to be given: (*c*) requires that the manufacturer shall intend the records which he makes to be dealt with in one or other of three ways: and (*d*) requires that if the intention is to deal with them in either of the first two of these ways a royalty shall be paid. Then subsection (2) provides for the amount of the royalty. Condition (*b*) refers to the prescribed notice and subsection (2) refers to royalty calculated in the prescribed manner. "Prescribed" means prescribed in Regulations made by the Board of Trade, and the Copyright Royalty System (Records) Regulations, 1957, have been so made. On the view which I take of the case it is unnecessary to base my judgment on the terms of these Regulations. One argument submitted for the respondents would, if correct, mean that some of them are ultra vires. My view of the section does not involve any such result in the present case, and it would not be right to speculate whether in some other case some inconsistency might emerge between the provisions of the Act and those of the Regulations.

It appears to me that all four statutory conditions are intended to be complied with before a record is made or anything is done which, apart from section 8, would amount to an infringement. Otherwise it could not be known when the record was made and sold by the manufacturer whether making the record was an infringement or not: that would depend on whether the condition was subsequently complied with or not. The respondents constructed a powerful argument on the basis that condition (*d*) only comes into operation after a record has been sold by retail and that no royalty is payable until then. But I do not so read the section. I think that the Regulations rightly provide that in his notice under (*b*) the manufacturer must state what is to be the ordinary retail selling price of the record and that determines the amount of the royalty. And again I think that the Regulations rightly provide for the manufacturer paying the royalty at a much earlier stage than after sale by retail. The manufacturer pays royalty on records which he intends to be sold by retail. Apart from the last purpose set out in condition (*c*) he is not entitled to make for any other purpose. And if later someone disposes of a record in some other way no part of the royalty can be recovered.

I can now turn to what appears to me to be the crucial question in this case: was the 1s. 6d. an "ordinary retail selling "price" within the meaning of section 8? That involves two questions, what was the nature of the contract between the Nestlé Co. and a person who sent 1s. 6d. plus 3 wrappers in acceptance of their offer, and what is meant by "ordinary retail "selling price" in this context.

To determine the nature of the contract one must find the intention of the parties as shown by what they said and did. The Nestlé Co.'s intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate. Their offer was addressed to everyone. It might be accepted by a person who was already a regular buyer of their chocolate; but, much more important to them, it might be accepted by people who might become regular buyers of their chocolate if they could be induced to try it and found they liked it. The inducement was something calculated to look like a bargain, a record at a very cheap price. It is in evidence that the ordinary price for a dance record is 6s. 6d. It is true that the ordinary record gives much longer playing time than the Nestlé records and it may have other advantages. But the reader of the Nestlé offer was not in a position to know that.

It seems to me clear that the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought. It is, of course, true that some wrappers might come from the chocolate which had already been bought or from chocolate which would have been bought without the offer, but that does not seem to me to alter the case. Where there is a large number of transactions—the notice mentions 30,000 records—I do not think we should simply consider an isolated case where it would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement that wrappers should be sent was of great importance to the Nestlé Co.; there would have been no point in their simply offering records for 1s. 6d. each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (*a*) does something of value to the supplier and (*b*) pays money: the consideration is both (*a*) and (*b*). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestlé Co., but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestlé Co. should require us to exclude from consideration the cases where it did. And even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement.

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Lord Reid.

I do not think that it matters greatly whether this kind of contract is called a sale or not. The appellants did not take the point that this transaction was not a sale. But I am bound to say that I have some doubts. If a contract under which a person is bound to do something as well as to pay money is a sale, then either the price includes the obligation as well as the money, or the consideration is the price plus the obligation. And I do not see why it should be different if he has to show that he has done something of value to the seller. It is to my mind illegitimate to argue—this is a sale, the consideration for a sale is the price, price can only include money or something which can be readily converted into an ascertainable sum of money, therefore anything like wrappers which have no money value when delivered cannot be part of the consideration.

The respondents avoid this difficulty by submitting that acquiring and delivering the wrappers was merely a condition which gave a qualification to buy and was not part of the consideration for sale. Of course, a person may limit his offer to persons qualified in a particular way, e.g., members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be re-acquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales. The purchaser of records had to send 3 wrappers for each record, so he had first to acquire them. The acquisition of wrappers by him was, at least in many cases, of direct benefit to the Nestlé Co., and required expenditure by the acquirer which he might not otherwise have incurred. To my mind the acquiring and delivering of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases.

Is such a transaction within the contemplation of section 8? I proceed on the view that it was a sale, and, if so, it was a sale by retail and not by wholesale. But subsections (1) and (2) must be read together in light of the apparent object of the section. Its object appears to me to be twofold, to benefit the public and to protect the financial interest of the owner of the copyright. The section makes it possible for records to be available to the public for the manufacture of which the owner might not have granted a licence. And it protects the copyright owner by requiring royalties to be paid on the ordinary retail selling price. Where records are sold in the ordinary way of business it can be assumed that in his own interest the manufacturer will fix a full price to cover not only the cost of production and his own profit but also the profit required by retailers. But where there is a special order and none of the records made are to be sold in the ordinary way but all are to be sold, as here, in an unusual way in order to promote a scheme for advertising quite a different business from selling records, the protection of the copyright owner is not at all secure. In such a case the retailer will get the manufacturer to fix such a retail selling price as will best suit him, and this may be something quite different from an ordinary economic price.

If the respondents are right, the owner of the copyright gets nothing in respect of the advantage to the retailer arising from the requirement that wrappers must be acquired and delivered, and he would get nothing in respect of any collateral advantage accruing to an advertiser however clear or however valuable. It is true that the price of 1s. 6d. left the Nestlé Co. with a profit after paying the cost of mounting, postage, and other expenses, though we do not know whether the profit was as great as retailers normally require. But the original proposal in this case was to sell at 1s. plus three wrappers and it might have suited the Nestlé Co. to sell at 9d. or 6d. plus six wrappers. It might even suit a particular advertiser to sell at less than the price he paid the manufacturer.

In its context I cannot interpret the phrase " ordinary retail " selling price " as applying to all sales however extraordinary in character and as meaning whatever money price may be charged irrespective of the type of transaction or of conditions attached to the sale or of collateral advantages accruing to the seller or of whether the money price is really the whole consideration for the sale. I am of opinion that the Hardy Co.'s notice that the ordinary retail selling price was 1s. 6d. was invalid, that there was no ordinary retail selling price in this case and that the respondents' operations were not within the ambit of section 8. They were therefore infringements of the appellants' copyright and in my judgment this appeal should be allowed.

LORD TUCKER. My Lords, this case has in its course through the courts resulted in a very narrow division of judicial opinion which shows that the point in issue, though short, is one of considerable difficulty. The conclusion which I have reached can, however, be stated quite shortly. I do not doubt that these records were supplied by the manufacturers " for the purpose of

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"being sold by retail" within the meaning of section 8 (1) (*c*) of the Copyright Act, 1956. I think the contrast throughout the section is between retail and wholesale sales and I can find no justification for limiting the sales to ordinary retail sales, nor do I find it easy to define what is an ordinary retail sale, but this does not, in my opinion, conclude the matter. The royalty has, by subsection (2), to be calculated on the basis of the "ordinary "retail selling price." This does not mean the price prevailing on an ordinary retail sale but the ordinary price obtainable on a retail sale, and I think the ordinary price so obtainable envisages a money sum constituting the entire consideration for the sale. Otherwise it would be impossible to calculate the royalty percentage payable in cases where the money value of the additional consideration is incapable of valuation. The fact that the retailer may choose to sell at a loss cannot affect the proper interpretation of the section or justify a sale by him for a sum of money plus the delivery of a number of wrappers or other articles which he desires to obtain for reasons which he considers beneficial to his trade. The ordinary retail selling price as prescribed by Regulation 3 of the Copyright Royalty System (Records) Regulations, 1957, provides that it is to be calculated "at the marked or "catalogued selling price of single records to the public." The records in question are marked as follows: "Remember all you "have to do to get each New Stars record is to send three "wrappers of Nestlé's 6d. milk chocolate bars together with postal "order for 1s. 6d." Under Regulation 1 (1) (*f*) the notice required by subsection (2) of section 8 must state the ordinary retail selling price as defined by Regulation 3. In the present case the notice, as amended, stated that "the ordinary retail selling price "of each record will not be greater than 1s. 1½d. exclusive of "purchase tax and not greater than 1s. 6d. inclusive of purchase "tax." This statement does not disclose the entire consideration but only that part of it that is expressed in terms of money and is therefore, in my opinion, defective. It is necessarily defective because it is impossible to state "the ordinary retail selling price" envisaged by subsection (2) if the money price is only part of the consideration.

If this is not the correct view it follows that there would be no infringement if the retailer sold each record for a penny plus one hundred wrappers, and I cannot believe that this could have been intended by those who framed this section and fixed the percentage of royalty on the basis of the ordinary retail selling price which must, I think, envisage a retail sale where the whole consideration is a sum of money.

It being conceded that if the notice given under Regulation 1 (1) (*f*) is defective the protection of section 8 is lost, and the notice given being, in my view, necessarily defective in view of the nature of the consideration, it follows that there has in this case been an infringement of the appellants' copyright.

I should add that I do not feel able to accept the view that the requirement with regard to the wrappers merely constituted a limited class of the public who having qualified for inclusion in the class then became entitled to purchase for 1s. 6d. This seems to me an unnecessarily artificial description of what is on its face one indivisible transaction.

For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, were it not that a majority of your Lordships think differently I would have contented myself with expressing my complete concurrence with the judgment of Jenkins L.J. in the Court of Appeal.

I find the appellants' case somewhat elusive as it seems to oscillate between considering whether the sale of the record here is an ordinary retail sale and considering whether there is an ordinary retail selling price of the record. I can find no warrant in section 8 of the statute for the view that it contemplates two kinds of retail sale, ordinary retail sale and some other kind of retail sale which is not ordinary. Subsection (1) of the section refers four times to retail sales, and when in subsection (2) reference is made to ordinary retail selling price the only meaning I can take from that is a reference to the ordinary selling price of the retail sales mentioned in subsection (1). As Jenkins L.J. points out, this is also the view taken in the Regulations made under the Act where, in the absence of a marked or catalogued selling price, the phrase is defined as "the highest price at which single "records are ordinarily to be sold to the public." In my opinion there is or is intended to be a sale of the record here and it is a retail sale. The only question, as I see it, is: "Is there an "ordinary retail selling price on which the royalty can be "calculated?"

As I agree with Jenkins L.J. that the production of three wrappers of three sixpenny bars of chocolate is merely a qualification for purchasing the record I will say only a few words on the contrary view that it is part of the consideration for the purchase of the record incapable of monetary assessment. To Nestlé these pieces of paper are worthless. Nestlé are no doubt pleased to see that somebody has been buying their chocolate. They would know that anyhow, without the production of chocolate wrappers, from the figures of their turnover. The wrappers represent an obligation on Nestlé rather than an extra consideration if it be assumed, as I think it must, that on presentation of the wrappers and the tender of 1s. 6d. Nestlé are bound to sell the record. But that is because of the offer they have made being accepted by a member of the public. If it be said that the sale of the record is of value to Nestlé because it promotes the sale of their chocolate, the same can be said of advertising their chocolate in the Press or in a number of other ways. Such overheads, like other overheads, go to increase the cost of production and, unless compensated by increased sales, may go to increase the price of the chocolate. But the retail price of 6d., or whatever it is, is just the price of the chocolate and nothing else. In the present case there is no reason for assuming that the price paid by the purchaser is paid for anything but the chocolate. As the facts show, there is ample profit to Nestlé in the sale of the record alone and no reason to attribute something extra in the sale of the chocolate.

It was suggested that for six wrappers and 1s. 3d. they might sell the record for 1s. 3d. They might if it was a business proposition and they chose so to encourage the sale of their chocolate. That would leave the problem as before. If for some reason which it is difficult to imagine they were to make alternative offers of a record for 1s. 6d. on production of three wrappers or for 1s. 3d. on production of six wrappers, that might suggest that the wrappers for some reason were worth one penny each. But that would certainly not mean that someone could compel a sale of a record for 1s. 9d. and no wrappers. The suggestion that these wrappers represent some intangible consideration seems to me to be entirely unreal. It only makes sense if it be assumed that in the sale of the chocolate the purchaser was paying something less than 1s. 6d. for the chocolate and the balance towards the purchase of the record. I have already dealt with that argument. I would only add that the purchase of the chocolate is (or would normally be) a contract with the retailer and there is nothing to suggest that the 1s. 6d. is anything more than the ordinary retail selling price of the chocolate sold, as other chocolate and other comestibles often are, in wrappers to keep them clean or to identify them or for advertising purposes. There may be some cases where containers have some intrinsic value which increase

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the selling price, but that is not this case. I agree with Jenkins L.J. that the price of 1s. 6d. was wholly attributable to and exhausted by the purchase of the chocolate.

The letter press in the advertisement "Fill in the coupon "and send it with a Postal Order for 1s. 6d., the price of the "record, and your three wrappers" and on the cardboard mount of the record "Send three wrappers from Nestlé's 6d. milk "chocolate bars, together with postal order for 1s. 6d." is, in my opinion, entirely consistent with, indeed, in my opinion, goes to support, the view that the ordinary retail selling price of the record is 1s. 6d.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, section 8 of the Copyright Act, 1956, provides for a royalty of an amount, subject to a minimum, equal to $6\frac{1}{4}$ per cent. of the ordinary retail selling price of the record. This necessarily implies, in my opinion, that a sale to be within the section must not only be retail, but one in which there is no other consideration for the transfer of property in the record but the money price. Parliament would never have based the royalty on a percentage of a money price if the section was to cover cases in which part, possibly the main part, of the consideration was to be other than money. This is in no sense a remarkable conclusion, as in most sales money is the sole consideration. It was not argued that the transaction was not a sale.

The question, then, is whether the three wrappers were part of the consideration or, as Jenkins L.J. held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store.

I think they are part of the consideration. They are so described in the offer. "They," the wrappers, "will help you "to get smash hit recordings." They are so described in the record itself—"all you have to do to get such new record is to "send three wrappers from Nestlé's 6d. milk chocolate bars, "together with postal order for 1s. 6d." This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration. For these reasons I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Syrett & Sons*; *McKenna & Co.*; *Howe & Rake.*

J. A. G.

ABERFOYLE PLANTATIONS LTD. . . . APPELLANT;

AND

KHAW BIAN CHENG . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Vendor and Purchaser—Completion—Date of—Conditional agreement—Condition to be performed by date fixed for completion of sale—General principles applicable to performance of conditional contracts—Malaya.

Contract—Time for performance—Conditional contract—Date fixed for completion of sale—Condition then unfulfilled.

At the date of a conditional agreement of November 8, 1955, for the sale by the appellant company to the respondent of a rubber estate totalling 1,336 acres in the State of Perak, the appellant vendor had a good title to 1,154 acres, but its title to the other 182 acres depended on the success of its negotiations with the Ruler of Perak for the renewal of seven previously expired leases. Clause 4 of the agreement provided that "The purchase is conditional on the "vendor obtaining . . . a renewal of the seven (7) leases . . . so as "to be in a position to transfer the same to the purchaser and "if for any cause whatsoever the vendor is unable to fulfil this "condition this agreement shall become null and void and the "vendor shall refund to the purchaser the . . . deposits already "made . . ." The agreement, in clause 9, stipulated that completion was to take place on or before April 30, 1956 (subsequently extended by the purchaser to May 31, 1956), and that on "the "purchaser paying the balance of the purchase price . . . the vendor "shall as soon as possible thereafter" execute a transfer of the property to the purchaser. The condition not having been fulfilled

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

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by June 11, 1956, the purchaser on that date brought the present action against the vendor claiming the return of deposits paid:—

Held, that on the true construction of the agreement the condition in clause 4 had to be performed at latest by April 30, 1956, the date fixed for completion of the purchase (or by the extended time granted by the purchaser), and accordingly, the respondent was entitled to the return of his deposits. Until the condition was fulfilled there was no contract of sale to be completed, and by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest. Similar considerations applied where a conditional contract of sale fixed no specific date for completion of the sale by the performance of both sides of the bargain, but did, as here, fix the date for the performance by the purchaser by payment of the purchase-money even though no definite date was fixed for the performance by the vendor of his part by the transfer of the property. The provision made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately on payment of the balance of the purchase-money did not prevent the transaction from amounting for the present purpose to completion of the purchase, though some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as possible."

The above views were in accord with the following general principles as warranted by authority and manifestly reasonable: (1) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date. (2) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time. (3) Where a conditional contract of sales fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles (post, pp. 124–125).

Smith v. *Butler* [1900] 1 Q.B. 694; 16 T.L.R. 208 and *In re Sandwell Park Colliery Co.* [1929] 1 Ch. 277 applied.

Judgment of the Court of Appeal of the Federation of Malaya affirmed.

Appeal (No. 36 of 1958) from an order of the Court of Appeal of the Federation of Malaya (June 2, 1958) allowing by a majority an appeal by the present respondent, Khaw Bian Cheng, from an order of the High Court of the Federation (November 8, 1957) dismissing his action against the present appellant, Aberfoyle Plantations Ltd.

The following facts are taken from the judgment of the Judicial Committee: The Harewood Estate, a rubber estate in the State of Perak, which was conditionally agreed to be sold by the appellant company to the respondent under an agreement of November 8, 1955, consisted of rubber plantations extending in round figures to a total area of some 1,336 acres. That area was made up of (a) some 1,154 acres held by the vendor's predecessor in title, Harewood Rubber Estates Ltd., as registered proprietor under certificates of title or grants from the Ruler of Perak, as to which no question arose; and (b) some 182 acres comprised in seven leases from the Ruler to Harewood Rubber Estates Ltd. which had in fact expired on June 19, 1950.

The vendor had succeeded to Harewood Rubber Estates Ltd.'s interests in 1951, as a result of an amalgamation under which the vendor acquired all the assets of Harewood Rubber Estates Ltd. in exchange for shares.

That meant that the vendor as beneficial owner of the 1,154 odd acres could readily procure the transfer of the legal title to the purchaser; and also that the vendor as between itself and Harewood Rubber Estates Ltd. would be entitled to the benefit of any renewals of the seven leases comprising the 182 odd acres if and when granted. But unless and until new leases were granted the vendor had no assignable interest in the 182 odd acres. Since the expiration of the leases in June, 1950, negotiations for their renewal, pursued over a matter of five years, had by the date of the agreement of November 8, 1955, achieved no conclusive result, the delay being largely due to protracted consideration by the State Government of the policy to be pursued with regard to the granting of State leases. In the meantime Harewood Rubber Estates Ltd., or the vendor, had remained in permissive occupation of the land comprised in the expired leases: and so the matter stood when the agreement of November 8, 1955, was entered into.

The position thus was that at the date of the agreement the vendor had a good title to the 1,154 odd acres, but that its title to the 182 odd acres depended on the success of its negotiations for the grant of new leases; and it was to the latter title that the condition giving rise to the present litigation related.

The material provisions of the agreement of November 8, 1955, were as follows: Clause 1 provided that " Subject to the condition " contained in clause 4 the vendor will sell and the purchaser will " buy " the property known as the Harewood Estate as described in the schedule to the agreement, which description included the land comprised in the seven expired leases. Clause 2 stated the price to be $525,000 apportioned as therein mentioned between land and buildings and movable plant, machinery and utensils, and continued as follows: "To account of this sum of $525,000 "the purchaser shall pay to the vendor the sum of $50,000 on the "signing of this agreement, a further sum of $50,000 on or "before February 1, 1956, and to pay the balance on or before "April 30, 1956. The purchaser shall only be entitled to enter "into possession of the estate after the purchase money of "$525,000 has been paid in full, and all profits earned prior to "that time shall belong to the company."

Clause 4, which contained the condition, should be stated in full: "The purchase is conditional on the vendor obtaining at the "vendor's expense a renewal of the seven (7) leases described "in the Schedule hereto so as to be in a position to transfer the "same to the purchaser and if for any cause whatsoever the "vendor is unable to fulfil this condition this agreement shall "become null and void and the vendor shall refund to the purchaser the deposit or deposits already made under clause 2 "hereof notwithstanding anything contained in clause 10 hereof."

Clause 7 provided that "the purchaser shall take over, purchase and pay for at cost" the various items therein mentioned "as at midnight on the day immediately preceding the date of "completion of sale." By clause 8: "All rubber harvested and "on hand as at midnight on the day immediately preceding the "date of completion of sale . . . shall belong to and remain the "property of the vendor . . ."

Clauses 9 and 10 were of importance. They were in these terms: "9. Completion of the purchase shall take place at "the offices of Messrs. Grumitt, Reid & Co. Ltd. on or before the "30th day of April, 1956, and upon the purchaser paying the "balance of the purchase price to the vendor, the vendor shall "as soon as possible thereafter execute a proper transfer or "transfers of the property to the purchaser or as he shall direct, "such transfer or transfers to be prepared and perfected, save as "to the execution thereof by the vendor, by and at the expense "of the purchaser and in the meantime the vendor agrees to "allow the purchaser to lodge a caveat against all the lands "pending the execution of the said transfer or transfers. And "the vendor shall if the purchaser so requires execute in favour "of the purchaser an irrevocable power of attorney authorising "the purchaser to execute all such transfers and documents as "shall be necessary for effectually vesting in the purchaser the "said mining leases." (It was agreed that the reference to "the said mining leases" at the end of clause 9 was intended as a reference to the seven new leases which the vendor was required to obtain under clause 4 by way of renewal of the seven expired leases.)

" 10. If from any cause (other than the vendor's default) " the purchase shall not be completed on the 30th April, 1956, or " the second deposit of $50,000/– shall not be made on or before " the 1st February, 1956, as herebefore provided then this agree- " ment shall become null and void and the deposit or deposits " already made will be forfeited."

Clause 11 provided that " Upon actual completion of the sale " the purchaser shall be entitled to possession of the property " hereby agreed to be sold and shall as from that date be liable " for all outgoings . . ." The same clause also provided that " The vendor shall not be liable for any deterioration of the " property after the time fixed for completion."

The two deposits of $50,000 payable under clause 2 were duly paid, but the vendor had not by April 30, 1956, fulfilled the condition stated in clause 4 by obtaining a renewal of the seven leases. It was true that by letter dated April 25, 1956, the Collector of Land Revenue informed the vendor's solicitors that the Ruler in Council had approved the issue of fresh leases, and that the vendor's name would be recorded in the Roll of Approved Applications; but it was not suggested that the procuring of such approval and enrolment amounted to compliance with the condition, requiring as it did the obtaining by the vendor of " a renewal " of the seven (7) leases . . . so as to be in a position to transfer " the same to the purchaser."

In those circumstances the purchaser's solicitors wrote to the vendor's solicitors on May 4, 1956, a letter concluding with this paragraph: " We refer you to clause 4 of the agreement under " which our client is entitled to rescind the contract and claim " back the deposit. But, before doing so, our client is prepared " to give your clients time till the 31st day of May, 1956, by " which date they should produce to us the issue documents of " title in respect of all the lands contracted to be sold and satisfy " us that they are in a position to make a good title and give a " registrable transfer. It must be understood that the extension " hereby granted is the utmost that our client agrees to and such " time must be deemed to be of the essence of the contract. If " a good title to convey all the lands capable of registration is " made out by 31st May, 1956, our client will pay over the " balance of purchase price and complete the transaction. Other- " wise, the contract will stand cancelled and your clients must "pay back the deposit with interest together with our client's "costs of investigating the title."

The condition being admittedly still unfulfilled, the purchaser by plaint dated June 11, 1956, began the action giving rise to the present appeal. The action claiming the return of the deposits was brought in the High Court at Ipoh and heard by Good J., who by an order dated November 8, 1957, dismissed it with costs. On appeal by the purchaser to the Court of Appeal for the Federation of Malaya (Thomson C.J., Sir John Whyatt C.J. (Singapore) and Barakbah J.), that court by a majority (Sir John Whyatt C.J. dissenting) allowed the appeal, the order to that effect being dated June 2, 1958. From that order the vendor now appealed to this Board with the support of two of the four judicial opinions so far delivered.

1959. Oct. 28, 29. *J. A. Plowman Q.C.* and *J. A. Wolfe* for the appellant. The question is primarily one of construction of the agreement of November 8, 1955. It is in an unusual form in that, whereas in the ordinary case the obligation of the purchaser to pay his purchase price and the obligation of the vendor to convey the property are concurrent obligations, one dependent on the other, in this case the parties expressly contracted out of that, the agreement providing that the respondent should pay his purchase-money on or before April 30, 1956, and that the appellant should execute a transfer of the property "as soon as "possible thereafter." The question is whether as a matter of construction of that agreement the respondent's obligations, and in particular his obligation to pay the purchase-money, were conditional on the appellant having obtained a renewal of the seven leases by April 30, 1956, so that it should be in a position on that date to transfer those leases to the respondent. Although the agreement provided that the transfer should be executed as soon as possible after that date, the respondent contends that it was a condition of the agreement that the appellant should nevertheless be in a position on April 30 to transfer the leases. Admittedly, on that date the appellant was not in a position to transfer the leases, so that if the respondent is right in saying that as a matter of construction of the contract the appellant was bound to be in a position to transfer them on that date, then this appeal will fail. On the other hand, if the appellant is right in saying that as a matter of construction it was not bound to be in a position to transfer the leases by April 30, two subsidiary questions arise: (1) Was the respondent entitled, four days after April 30, namely, on May 4, to serve, as he did, a notice limiting the time for the performance by the appellant of its obligations in regard to the transfer of the leases? (2) If he was entitled to serve such notice, was the notice which he in fact served—27 days' notice—sufficiently long?

The agreement has to be construed in the light of the surrounding circumstances. The respondent gets possession of the whole estate on April 30, and it is only a question of awaiting the renewal of the leases when he will get a legal title to the whole property as well as possession. He takes over a going concern and can carry it on; he knows that there is no trouble about the 1,154 acres and that there is only this question about the leases which is probably going to be all right. The parties went into the transaction with their eyes open, knowing that the question if and when the appellant would be in a position to transfer the leaseholds was not a matter which lay within its control but in the control of the Perak State Government. Therefore in that situation it was not a matter for the appellant to say whether or not it would be in such a position on April 30. The majority of the Court of Appeal read into clause 4 a condition which is not there in terms, namely, that renewal of these leases should have been obtained before April 30, 1956. "As soon as "possible" is to be construed on general principles as being within a reasonable time, which is a question of fact.

Where a contract is conditional the condition must be performed before completion: *Smith* v. *Butler*.[1] That prima facie rule or proposition must be accepted, but clause 9 of this contract distinguishes the present case entirely from *Smith's* case [1] because, it is submitted, it is clear that on the construction of that clause the appellant was not required to be in a position to transfer the leases by April 30. It is to be within a reasonable time. The striking fact here is that the parties were expressly contracting out of the usual obligations whereby payment of the purchase-money and conveyance of the estate are concurrent obligations. The fundamental key to the interpretation of this contract is in clause 9. The court will not imply a term in order to give business efficacy to a contract "unless . . . it is clear "beyond a peradventure that both parties intended a given term "to operate": *per* Jenkins L.J. in *K. C. Sethia (1944) Ltd.* v. *Partabmull Rameshwar*.[2] Applying that test here, it certainly cannot be said beyond a peradventure that both parties intended that the appellant should be in a position by April 30 to transfer this estate.

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[1] [1900] 1 Q.B. 694; 16 T.L.R. 208.

[2] [1950] 1 All E.R. 51, 59.

Next, assuming that the appellant is right on construction and that it was not bound to be in a position to transfer the leases by April 30, the question arises, first, whether the respondent was entitled to limit the time within which the appellant must be in a position to transfer them, and to make the time so limited of the essence of the contract. The respondent was not entitled to do anything of the sort, for the reason that on May 4, which was only four days after April 30, the appellant was not in any sense in default. It is only where one party is in default that the other party is entitled to limit time: Fry on Specific Performance of Contracts, 6th ed., p. 510, para. 1092—that principle has been considered in a number of cases, perhaps the best known being *Green* v. *Sevin*[3]; see also *Stickney* v. *Keeble*[4] and *Smith* v. *Hamilton*.[5] The respondent was not in a position to serve the notice at all. Secondly, on this point, whether it is a reasonable time is a question of fact depending on all the circumstances: *Stickney* v. *Keeble*.[6] The 27 days here were not long enough; there is a finding of fact to that effect by two of the judges below which, it is submitted, this Board will be slow to disturb. In the case of a condition to be performed before completion, time is of the essence: *In re Sandwell Park Colliery Co.*[7]

Geoffrey Cross Q.C. and *T. A. C. Burgess* for the respondent. Nothing whatever turns on the fact that the application for the leases was approved by the Ruler in Council in Perak a few days before April 30. The first point on the contract is that it is subject to a condition precedent in clause 4. If that is so, there would be no binding obligation to purchase until the condition is fulfilled: *In re Sandwell Park Colliery Co.*, where Maugham J. (as he then was) said[8]: " a condition precedent to the validity of " a contract for sale of land must prima facie, in the absence of " express provision, be fulfilled before the date fixed for comple- " tion." Applying that to this case, if it were not for the words in clause 9, nobody could seriously suggest that the condition in clause 4 was not to be performed before April 30. There is not enough in clause 9 to override the condition precedent provisions of clause 4, particularly in the absence of any provision for restitutio in integrum.

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[3] (1879) 13 Ch.D. 589.

[4] [1915] A.C. 386; 31 T.L.R. 221.

[5] [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.

[6] [1915] A.C. 386, 419.

[7] [1929] 1 Ch. 277.

[8] Ibid. 283.

Clause 4 is not the ordinary provision such as is implied in any contract for the sale of land—that the vendor will show a good title to the property concerned. In the ordinary case time is not of the essence unless it is expressly made so. But here, as is submitted, clause 4 is a condition precedent to the creation of the relation of vendor and purchaser, and therefore different considerations apply. In the first place, where there is a condition precedent, the vendor is under no liability if the condition is not fulfilled; and if he cannot show any title to the property, there is no question of his being liable in damages: he would say that there never has been a contract at all. In such a case of a condition precedent, unless there is a particular express provision to the contrary, the condition precedent would have to be performed before the time fixed for completion, when the purchaser would have to be ready with his money, and that is what Maugham J. said in *In re Sandwell Park Colliery Co.*[9] In the present case the time fixed for completion is clearly April 30 or, by extension, May 31, and there is no distinction to be drawn between the phrases completion of the sale and completion of the purchase—they both refer to the same date, April 30. On a fair reading of the contract, there is no ground for saying that there is here some express provision to the contrary which allows the vendor time after the date fixed for completion for the fulfilment of this condition.

The appellant says that, notwithstanding clause 4, a sufficient contrary intention is shown in clause 9, and that the words "as soon as possible" were referring to the possibility of the application for the renewal of the leases and their not being renewed before April 30. As against that, if that was what was in the minds of the parties, it seems very odd that the interim protection of the purchaser should take the form of lodging caveats and having a power of attorney; there is not enough in those words to amount to an express provision to the contrary, and in any case caveats and powers of attorney are not applicable to State land: Land Code, c. 138 (Malaya) (1954 ed.), ss. 2, 169, 180, 246; Land Rules (made under s. 246), rr. 2, 3, 4, 5, 7, 9, 10 and 12.

Plowman Q.C. in reply. To insert in clause 4 "by April 30," when the parties knew that about six months would elapse before the renewal of the leases, would render this contract almost nugatory from the appellant's point of view. On the construction for which the appellant is submitting, the condition in clause 4 is clearly not a condition precedent. In regard to the interim protection given by clause 9 by the caveats and the power of attorney, this provision is perfectly apt as regards the 1,154 acres. While the caveat may not be applicable to the leases in view of the land titles point, it is submitted that the power of attorney may be very useful as regards the leaseholds.

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[9] [1929] 1 Ch. 277.

Dec. 1. The judgment of their Lordships was delivered by LORD JENKINS. The question in this case is whether upon the true construction of a conditional agreement dated November 8, 1955, and made between the defendant (now appellant), Aberfoyle Plantations Ltd. (hereinafter called "the vendor"), of the one part, and the plaintiff (now respondent), Khaw Bian Cheng (hereinafter called "the purchaser"), of the other part, being an agreement providing, subject to the condition therein mentioned, for the sale by the vendor to the purchaser of a rubber estate in the State of Perak known as the Harewood Estate, and in the events which happened, the purchaser became entitled to the return of deposits amounting to $100,000 paid by him to the vendor thereunder, on the ground that the condition in question had not been performed by the vendor within the time thereby limited for its performance. The case has given rise to a considerable difference of judicial opinion in the courts below.

[His Lordship stated the facts set out above and continued:] Their Lordships may now return to the question exhaustively debated before them and in the courts below: Within what period of time did the agreement (read in conjunction with the purchaser's solicitors' letter of May 4, 1956) require the condition contained in clause 4 to be performed? The answer to that question must plainly depend upon the true construction of the agreement, or in other words, upon the intention of the parties as expressed in, or to be implied from, the language they have used.

But, subject to this overriding consideration, their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;

(iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

See *Smith* v. *Butler*,[1] where the purchaser treated a conditional contract as at an end for non-fulfilment of the condition before the date fixed for completion, and it was held that the vendor had until the date fixed for completion to perform the condition; that the contract had therefore gone off through the default of the purchaser; and that he could not recover his deposit. Romer L.J. (as he then was) said this[2]: "To my mind "it is reasonably clear that the vendor has until the time fixed "for completion, or, if no time for completion is fixed, then a "reasonable time, in which to procure the assent of the mort- "gagee to the acceptance of the purchaser as mortgagor," such acceptance being the condition in question in that case.

In *In re Sandwell Park Colliery Co.*[3] Maugham J. (as he then was) held (following *Smith* v. *Butler*[4]) that where in a debenture holder's action the receiver contracted to sell property included in the debentures subject to the contract being approved and sanctioned by the court, and no date was fixed for obtaining such approval, it had to be obtained before the date fixed for completion of the contract. Maugham J., after referring to *Smith* v. *Butler*[4] and quoting the passage from the judgment of Romer L.J. to which their Lordships have already referred, continued as follows[5]: "I think, taking the judgments as a whole, it is "reasonably apparent that the court took the view that the date "fixed for completion was the time by which the condition had "to be performed, and considered that if that time had passed "the purchaser might have recovered the deposit. The cases of "*In re Head's Trustees and Macdonald*[6] and *Bellamy* v. *Deben-* "*ham*,[7] though not so closely in point, seem to me to support the "view that a condition precedent to the validity of a contract for "sale of land must prima facie, in the absence of express pro- "vision, be fulfilled before the date fixed for completion."

Earlier in the judgment of Maugham J. comes this important passage bearing particularly on the third of the propositions above stated[8]: "Courts of equity, in dealing with actions for specific "performance relating to land, have been accustomed to give "effect to the real intention rather than to the precise words "fixing the date for completion. The effect is that a clause fixing "the date for completion is equivalent to a clause stating that "completion shall be on that date or within a reasonable time "thereafter. But there is no ground for a similar construction "in the case of a condition upon which the validity of the con- "tract as one sale '(sic: q. "one of sale")' depends. The "distinction is obvious. In the first case both parties are bound, "and a moderate delay in completion is thought not to injure "either. In the latter, the very existence of the mutual obliga- "tions is dependent on the performance of the condition. The "purchasers do not know in the first instance if their purchase- "money will ever be required. In general, and in the present "case, there is no promise or undertaking by the vendor that "the condition will be fulfilled. Equity has, I think, never "applied its liberal views as to time to such a condition. If a "date is mentioned, the condition must be exactly complied with. "If a date is not mentioned, the condition must be fulfilled "within a reasonable time; there is no difference between the "views of law and equity in considering what is a reasonable "time, and the uncertain position of the purchasers must be "borne in mind."

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[1] [1900] 1 Q.B. 694; 16 T.L.R. 208.

[2] [1900] 1 Q.B. 694, 699.

[3] [1929] 1 Ch. 277.

[4] [1900] 1 Q.B. 694.

[5] [1929] 1 Ch. 277, 283.

[6] (1890) 45 Ch.D. 310.

[7] [1891] 1 Ch. 412; 7 T.L.R. 199.

Before parting with these two authorities their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

Similar considerations are in their Lordships' judgment applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for the performance on the part of the purchaser of his part of the bargain by payment of the purchase-money, even though no definite date is fixed for the performance on the part of the vendor of his part of the bargain by the transfer of the property. In such a case it could hardly have been

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[8] [1929] 1 Ch. 277, 282.

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intended that the purchaser should on the date specified perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition; for unless that had happened by the date specified there would on that date in truth be no contract for the purchaser to perform.

Reverting to the present agreement with these general principles in mind, their Lordships ask themselves whether upon the true construction of this agreement the condition stated in clause 4 had (as the purchaser contends) to be fulfilled at latest by April 30, 1956 (extended to May 31, 1956, by the purchaser's solicitors' letter of May 4), as the date fixed by the parties for the completion of the purchase, or at all events for the performance by the purchaser of his part of the bargain by payment of the balance of the purchase-money; or only had to be fulfilled (as the vendor contended) within a reasonable time, on the footing that the agreement did not expressly or by implication fix any particular date by which it was to be fulfilled.

Mr. Plowman's argument for the vendor (as developed before their Lordships) was to this effect: (i) Having regard to the surrounding circumstances in which the agreement was made it can hardly have been the intention of the parties that the condition (postulating as it did the bringing to a satisfactory conclusion of negotiations which had been dragging on for a matter of six years) must be fulfilled within so short a time as the period of just under six months from the date of the agreement (i.e., November 8, 1955) to April 30, 1956. (ii) Their Lordships should therefore be predisposed in favour of a construction which would give the vendor a reasonable time within which to fulfil the condition. (iii) The agreement was well capable of being, and should be, construed as allowing a reasonable time for that purpose. (iv) In view of the absence of any express provision in the contract limiting the time for the fulfilment of the condition, an intention to allow a reasonable time was to be inferred, and the purchaser could only escape this conclusion on the footing that April 30, 1956, was the date fixed for completion of the contract, so as to bring the case within the principle of *Smith* v. *Butler*[9] and *In re Sandwell Park Colliery Co.*[10] (v) Clause 9 showed that although the parties themselves described April 30, 1956, as the date on which the contract was to be completed, what was to take place on that day did not amount to completion, because on payment of the

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[9] [1900] 1 Q.B. 694.

[10] [1929] 1 Ch. 277.

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purchase-money the vendor was only made liable under that clause to execute a proper transfer or transfers "as soon as "possible thereafter," and this qualification of a vendor's ordinary obligation to convey against payment of the purchase-price should be taken to have been advisedly inserted in clause 9, so as to give the vendor a reasonable time to fulfil the condition if it had not already done so, the purchaser's position being protected in the meantime by the caveat and power of attorney therein mentioned.

If he was right so far, Mr. Plowman contended with force that time not being originally of the essence of the contract the purchaser could not make it so by serving the notice of May 4,1956, because it could not then be said that the vendor had been guilty of any delay or default such as had to be shown in order to entitle the purchaser to serve such a notice, and he referred their Lordships to Fry on Specific Performance, 6th ed., p. 510, para. 1092; *Green* v. *Sevin*[11]; *Stickney* v. *Keeble*[12]; and *Smith* v. *Hamilton*.[13] He also contended that, even if a case for the service of such a notice had been made out, the notice (given on May 4, 1956, to expire on May 31) was in all the circumstances of the case unreasonably short. Given acceptance of the contention that the vendor was entitled to a reasonable time to fulfil the condition, their Lordships would be disposed to agree. But the view they have formed as regards the time for fulfilment of the condition makes it unnecessary to dwell further on this aspect of the case.

The argument presented by Mr. Cross on the purchaser's side, in favour of the view that the agreement demanded fulfilment of the condition at latest by April 30, 1956 (extended by the letter of May 4 to May 31, 1956), appears to their Lordships to be far more convincing. This argument rightly stresses the fact that at the very outset of the agreement the vendor's obligation to sell, and the purchaser's obligation to buy, were by clause 1 expressed to be subject to the condition contained in clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

Then in clause 4 itself "the purchase" was made "con"ditional upon" the vendor obtaining a renewal of the leases, and in the event of the vendor being "unable to fulfil this "condition" the agreement was to "become null and void," and the vendor was to refund the deposit or deposits already made under clause 2, notwithstanding anything contained in clause 10. Reference back to clause 2 shows that the first deposit was to be paid on the signing of the agreement, and the second on February 1, 1956, while the balance of the purchase-money was to be paid on April 30, 1956. But clause 4, in the event of the agreement becoming null and void, only required repayment of the deposit or deposits already made under clause 2, without any such requirement as to the balance of the purchase-money. This seems to their Lordships to afford some indication that the condition was to be fulfilled (if at all) by the date fixed for the payment of the balance of the purchase-money (viz., April 30, 1956), for the case of avoidance of the agreement on any later date for non-fulfilment of the condition would demand a provision for repayment of the entire purchase-money and not merely the deposit or deposits. It is next to be observed that clauses 9 and 10 contained express provisions as to the completion of the purchase on April 30, 1956. Clause 9 provided that the purchase should be completed at the offices of a named company on or before April 30, 1956, going on to say: "and upon the purchaser "paying the balance of the purchase price to the vendor the "vendor shall as soon as possible thereafter execute a proper "transfer or transfers to the purchaser or as he shall direct. . . ." This appears to their Lordships to amount to the fixing of April 30, 1956, as the date for completion of the purchase for the purposes of the first of the principles deducible from *Smith* v. *Butler*[14] and *In re Sandwell Park Colliery Co.*,[15] and at all events to be well within the extension of that principle above enunciated. On April 30, 1956, the purchaser was to pay the balance of the purchase-money. That would entitle him to possession of the premises (see clauses 2 and 11), and make the vendor a bare trustee for him. The vendor, on his part, would become immediately bound to execute the transfers necessary to vest the legal estate in the purchaser, subject to such allowance of time within which to perform that duty as might be indicated by the words "as soon as possible." The provision thus made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately upon the payment of the balance of the purchase-money did not, in their Lordships' opinion, prevent the transaction described as completion of the purchase in clause 9 from amounting for the present purpose to completion of the purchase, which is the description applied to it by the parties themselves. A provision in a sale agreement to the effect that the sale should be completed on such a date and at such a place, when the purchaser should pay the purchase-price, and the vendor should thenceforth hold the property in trust for the purchaser, would, in their Lordships' view, clearly amount to a provision for completion of the sale. At all events, the purchaser, by paying the balance of the purchase-money in accordance with clause 9, would fully discharge his part of the bargain, which must, in their Lordships' view, necessarily presuppose the existence of a binding agreement, of which he would be discharging his part. Clause 10, which requires completion of the purchase (i.e., by payment of the purchase-money) on April 30, 1956, on pain of forfeiture of the deposits, points in the same direction.

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[11] (1879) 13 Ch.D. 589, 599.

[12] [1915] A.C. 386; 31 T.L.R. 221.

[13] [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.

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[14] [1900] 1 Q.B. 694.

[15] [1929] 1 Ch. 277.

The references in clauses 7 and 8 to " the date of completion " of sale " must, in their Lordships' view, be taken for the present purpose as meaning April 30, 1956, as the date agreed by the parties for completion, and so construed appear to their Lordships to support the purchaser's contention.

To take a broader view of the matter, it seems to their Lordships that the vendor's contention as to the construction and effect of the agreement would produce results so unreasonable that the parties should not be taken to have intended them unless the language they have used clearly shows the contrary. The purchaser would have been obliged to perform his part of the bargain on or before April 30, 1956, by paying the balance of the purchase-money before there was any binding contract, and with no assurance that a binding contract would ever emerge. On the other hand, the vendor would have been under no effective obligation to procure the fulfilment of the condition within any foreseeable time or at all. Again, from the vendor's point of view, he would have been under an obligation on April 30, 1956, to let the purchaser into possession or receipt of the rents and profits against payment of the purchase-money, before it was known whether fulfilment of the condition would ever be procured. It is unnecessary to enlarge on the confusion which would thus have resulted in the event of the agreement ultimately being avoided for non-fulfilment of the condition.

On the vendor's side it was argued that the provision in clause 9 to the effect that the vendor should " as soon as possible " thereafter execute a proper transfer or transfers of the property " to the purchaser " included the doing of what had to be done in

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order to fulfil the condition stated in clause 4, and thus allowed the vendor a reasonable time after April 30, 1956, within which to comply with the condition. Their Lordships cannot agree. Under clause 4 what the vendor had to do was to obtain a renewal of the seven leases so as to be in a position to transfer the same to the purchaser. Under clause 9 the vendor was to transfer the property sold (including the leases so renewed) " as soon as " possible " after the payment by the purchaser on April 30 of the balance of the purchase-money. But he must by then have obtained the renewal of the leases so as to be in a position to transfer them, even though some delay in the actual execution of the transfer might be allowable by virtue of the words " as soon " as possible." The provisions in clause 9 regarding the lodging of a caveat and granting of a power of attorney appear to their Lordships to be (as Mr. Cross submitted) more appropriate to the protection and transfer of existing registered interests than to the procuring of interests yet to be obtained.

Their Lordships can attach no importance to the vendor's argument based on surrounding circumstances. The parties chose to fix April 30, 1956, by the agreement as the date for what they themselves described as " completion " and must be bound by that choice.

It should also be placed on record that certain evidence as to an alteration made in clause 4 of the draft of the agreement when the matter was in negotiation, which Good J. appears to have admitted, was, in their Lordships' view, wholly inadmissible for the purpose of construing the agreement itself, and was by common consent excluded from consideration at the hearing before them.

For the reasons above stated, which substantially accord with those expressed by the majority of the Court of Appeal, and also accord with the principles of *Smith* v. *Butler*[16] and *In re Sandwell Park Colliery Co.*,[17] their Lordships are of opinion that the purchaser's appeal to that court was rightly allowed, and that the present appeal by the vendor must fail.

Their Lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed and that the appellant ought to pay the costs of this appeal.

Solicitors: *Shelton, Cobb & Co.; Peacock & Goddard.*

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[16] [1900] 1 Q.B. 694.

[17] [1929] 1 Ch. 277.

J. C.*

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SIR EDWARD BETHAM BEETHAM AND
ANOTHER . . . . APPELLANTS;

AND

TRINIDAD CEMENT LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trade Dispute — Definition — " Difference " — Trade union acting for employees of company—Claim for bargaining status—Refusal of company to recognise union—" Difference " between union and company—Governor's statutory duty to " inquire " into causes of dispute before appointing board of inquiry—Administrative, not judicial or quasi-judicial inquiry—Trade Disputes (Arbitration and Inquiry) Ordinance, Laws of Trinidad and Tobago, 1950 *Rev.* (*c.* 22, *No.* 10), *ss.* 2 (1), 8 (1)—*Industrial Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 69), *s.* 4 (1)—*Trade Disputes Act,* 1906 (6 *Edw.* 7, *c.* 47), *s.* 5.

The Trade Disputes (Arbitration and Inquiry) Ordinance, 1950, of Trinidad and Tobago (identical in relevant respects with corresponding United Kingdom legislation) provides by section 8: "(1) Where any trade dispute exists . . . the Governor may . . . "inquire into the causes and circumstances of the dispute, and, if "he thinks fit, refer any matters appearing to him to be connected "with or relevant to the dispute to a board of inquiry appointed "by him . . ."

By section 2 (1): "'Trade dispute' means any dispute or "difference between employers and workmen . . . connected with "the employment or non-employment . . . of any person."

Two out of the number of employees of the respondent company who belonged to a trade union were dismissed by the company. The union sought to persuade the company to discuss the cases of the dismissed men, but the company refused to recognise the union as authorised to act on behalf of employees who had individual grievances, stating that the company had its own works committee for dealing with such cases. Shortly thereafter the union wrote to the company claiming that it then represented "a substantial "majority" of the company's employees and was applying "for "bargaining status" for the manual workers of the company, and it took the matter up with the Commissioner for Labour who, however, was immediately informed by the company that it had "no intention of becoming involved in any way with the union "concerned." On the matter being reported to him, the Governor of Trinidad, acting under section 8 (1) of the Trade Disputes (Arbitration and Inquiry) Ordinance, appointed a board of inquiry to inquire into and report on the causes and circumstances of a trade dispute which, the minute of appointment stated, existed. Thereupon the company, alleging that there was no trade dispute to be inquired into, began the present proceedings claiming that the appointment of the board of inquiry was ultra vires and null and void:—

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

Held, that by definition a trade dispute existed wherever a "difference" existed, and a difference could exist long before the parties became locked in combat—it was sufficient that they should be sparring for an opening. Here, where, in relation to their claim for bargaining status, the union were asking to be allowed to negotiate and the company were persistently refusing to do so, there was clearly a difference between them, and "it would be "strangely out of date to hold . . . that a difference between a "trade union acting for its members and their employers cannot be "a trade dispute." Further, the union, in making its claim for bargaining status, *was* acting for its members, for the claim had been brought to the attention of the union members in the company, who might fairly be assumed to have approved of it, and, in consequence, the difference was one "between employers and work-"men." Accordingly, at the time when the Governor appointed the board of inquiry there was in existence a dispute whether the workmen should be permitted to have the union as their bargaining agent, and the appointment was not null and void.

Dictum of Lord Wright in *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 189; 59 T.L.R. 1; [1942] 2 All E.R. 425 applied.

Reg. v. *Industrial Disputes Tribunal, Ex parte American Express Co.*, The Times, July 23, 1954, approved.

The provision in section 8 (1) of the Ordinance that the Governor "may . . . inquire into the causes and circumstances of the "dispute" before appointing a board of inquiry meant that he must inquire in his administrative capacity, and not that he had to conduct anything in the nature of a judicial or quasi-judicial inquiry.

Local Government Board v. *Arlidge* [1915] A.C. 120; 30 T.L.R. 672 considered.

Order of the Supreme Court of Trinidad and Tobago reversed.

Appeal (No. 29 of 1958) from an order of the Supreme Court of Trinidad and Tobago (November 14, 1957).

The following facts are taken from the judgment of the Judicial Committee: On April 16, 1956, the Governor of Trinidad appointed a board of inquiry. It consisted of Mr. Bernard Gillis Q.C. sitting alone. His duty was to inquire into a trade dispute which was said to exist in the island between a company called Trinidad Cement Ltd. and certain of its workmen. On the next day, April 17, 1956, Mr. Gillis sat to hold the inquiry but the company at once objected to it. It said there was no trade dispute for him to inquire into. Mr. Gillis thereupon adjourned the hearing so as to enable the company to challenge the validity of the Governor's action. On May 25, 1956, the company issued a writ in the Supreme Court of the colony claiming that the appointment by the Governor of the board of inquiry was ultra vires and therefore null and void. The case was tried before Archer J. who, on November 14, 1957, made an order declaring the appointment null and void. The Governor appealed from his decision to Her Majesty in Council.

In making the appointment the Governor presumed to act under an Ordinance called the Trade Disputes (Arbitration and Inquiry) Ordinance, which said in section 8 (1) that: " Where " any trade dispute exists or is apprehended the Governor may, " whether or not the dispute is reported to him under this Ordin-" ance, inquire into the causes and circumstances of the dispute " and, if he thinks fit, refer any matters appearing to him to be " connected with or relevant to the dispute to a Board of In-" quiry . . . appointed by him for the purpose of such reference, " and the Board shall inquire into the matters referred to it and " report thereon to the Governor." Section 8 (3) said that the board might, if the Governor thought fit, consist of one person appointed by the Governor.

The phrase " trade dispute " was defined by section 2 (1) in these terms: " ' Trade Dispute ' means any dispute or difference " between employers and workmen, or between workmen and " workmen, connected with the employment or non-employment, " or the terms of the employment, or with the conditions of " labour, of any person."

Trinidad Cement Ltd. (hereinafter called " the company ") had a factory at Claxton Bay where they employed from 300 to 500 men. The Federated Workers' Trade Union (hereinafter called " the union ") sought to get the workers at the factory to join the union and succeeded in getting 100 or 200 to do so. These formed a branch of their own within the union.

On October 15, 1955, the company dismissed a workman called Clifford Bobb, who was a member of the union. The union took up his case and wrote to the company asking " for an early inter-" view along with Mr. Bobb and his witnesses so that an amicable " settlement can be reached." The company did not reply. The union wrote again to the company. This letter, too, was ignored. The union thereupon wrote to the Commissioner for Labour in the island and asked him if he could arrange a meeting with both parties under his chairmanship " to go into this most important " matter." As it happened, just about this time in November, 1955, the company dismissed another workman called Edmund Simon, who was also a member of the union. So the union took up his case too. They asked the Commissioner for Labour if he could arrange for his case to be discussed at the same time as that of Mr. Bobb.

The Commissioner for Labour was willing to do as he was asked. He tried to arrange a meeting between both parties: but he failed because of the attitude taken up by the company. The commissioner's representative went to see the company's works manager on November 29, 1955. He was told quite bluntly that the company " do not recognise the union and are therefore not " prepared to accede to the union's request for a meeting to " discuss the dismissal of Clifford Bobb or Edmund Simon." The works manager said that the company had its own machinery by way of a works committee for dealing with the grievances of workmen, and it was not willing to meet the union to discuss the dismissals.

On January 7, 1956, the matter reached a higher level. The commissioner having failed to arrange a meeting, the Minister for Labour himself intervened. He asked the company to come and see him. At this meeting he told the company's representative that the company's refusal to meet the union was a source of embarrassment to the Government: and that if the company persisted in its attitude, he would have to consider reporting the matter to the Executive Council with a view to having an inquiry instituted. Even this had no effect on the company. On January 9, 1956, the works manager wrote to the Minister saying: " We " are quite unable to discuss the matters referred to any further."

On March 15, 1956, the men at the factory, who were members of the union, held a branch meeting. They thought that the inquiry to deal with the Bobb and Simon matters was too long delayed. A resolution was passed unanimously recommending that the head office of the union should write to the Government to have the matter expedited. The men at this meeting were concerned about the delay with the Bobb and Simon matters and nothing else.

Thus far there were two matters in dispute: the first was whether or not the dismissals of Bobb and Simon were justified: but this had merged into the second, which was whether the union had any locus standi to take up such matters with the company. The company refused to recognise the union as being authorised to act on behalf of its members (like Bobb and Simon) who had individual grievances: and the union took strong exception to this refusal.

On March 26, 1956, the union staked out its claim to recognition by the company. The union claimed not merely "limited "recognition" but "general recognition." If the members of a union were in a minority in a factory, the union might well claim to represent its own members in cases of individual grievances, but it could not claim to bargain on behalf of all the workmen in the factory. In such a case the employers might afford the union "limited recognition," that was, recognition limited to individual grievances. But if the members of a union were in a majority, then the union might claim to make representations on behalf of everyone—whether members of the union or not—and might claim full bargaining rights on general questions of wages and working conditions. In such a case the employers might afford the union "general recognition."

The claim which the union made on March 26 was not merely for limited recognition (which would cover the Bobb and Simon cases) but for general recognition as a majority union. On that day the general secretary wrote to the company: "I am directed "by the executive committee of the above-named union to "inform you that the union now represents a substantial majority "of your employees and is applying for bargaining status for the "manual workers of your company." In addition, he asked for the membership to be checked to confirm the claim. (It should be noticed that the general secretary brought this letter to the attention of the branch. He sent a copy to the secretary of the branch at the same time as he sent the original to the company.) The company did not reply to this letter. It ignored it as it had done the earlier letters. So the union took the matter up again with the Commissioner for Labour. And he again did his best. He wrote to the company asking whether they were agreeable to the membership being checked. The reply of the company was short and to the point. It was dated April 14, 1956, and addressed to the commissioner: "As we have no intention of "becoming involved in any way with the union concerned, we "do not feel that any useful purpose would be served by adopting "the suggestion contained in your letter."

April 14, 1956, was a Saturday. The letter was received (as the trial judge found) by the Commissioner for Labour on April 16, 1956. He did not wait to tell the trade union about it. He seemed to have reported it straight away to the Governor who, on the self-same day, appointed Mr. Gillis Q.C. to hold an inquiry.

The inquiry, as already pointed out, proved abortive because the validity of it was challenged by the company.

From that time forward the branch of the union at Claxton Bay disintegrated rapidly. The men said: "If we cannot get any "result from these two cases, what is the use of belonging to the "union." By the end of August or September, 1956, not a single member was paying his subscriptions. The branch died and with it all the disputes, whatever they were, petered out. No longer were the dismissals a live issue. No longer could the union claim limited or general recognition at Claxton Bay, for it had no members there whom it could represent. No issue was left between the union and the company. But serious issues remained between the company and the Governor of Trinidad: because the company had successfully challenged his authority in the courts and he appealed to Her Majesty in Council so as to know whether his action was lawful or not.

1959. Nov. 11, 12. *Sir Lionel Heald Q.C.* and *J. G. Le Quesne* for the appellants. The fundamental question is whether, as stated by the Governor in his minute of appointment, there was in existence on the date when the appointment was made a trade dispute within the meaning of the Ordinance. It is a narrow issue, not susceptible of lengthy argument, which depends on the proper construction of the language of the Ordinance, and it comes down to the simpler point whether the respondents' denial of recognition of the branch of the Federated Workers' Trade Union involves a trade dispute. It is submitted that Archer J., in holding that the circumstances here, in which clearly recognition was refused to this branch of the trade union, did not involve a trade dispute, took altogether a too restricted view of the meaning of trade dispute. The immediate practical effect of that decision on the respondent company was very small, but its effect on the practical utility of the Ordinance and the industrial conciliation machinery of the colony, in the view of those most competent to know, may be catastrophic. There is no serious dispute as to the facts. The respondents have always taken the view that this trade union was undesirable from their point of view and that they would have nothing whatever to do with it, and that their own works committee was quite adequate.

The words "trade dispute" are not new words; it is not a technical term in any narrow sense. Several judges have said that each case must be judged on its merits and that reference to authorities is not of much assistance. No judicial definition

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of " trade dispute " exists or is possible. There is a statutory definition in the Ordinance, and it has been said that when Parliament has given a definition that definition should not be improved but applied. The statutory origin of the words " in " . . . furtherance of a trade dispute " is section 3 of the Conspiracy and Protection of Property Act, 1875. See also section 5 of the Trade Disputes Act, 1906, for the definition there. The words " trade dispute " must be read as ordinary English words and given a common-sense meaning: *Conway* v. *Wade*.[1] The short and clear words in which Lord Goddard C.J. dealt with this point in *Reg.* v. *Industrial Disputes Tribunal, Ex parte American Express Co.*[2] are relied on and adopted as a guidance. See also *Reg.* v. *Industrial Disputes Tribunal, Ex parte Courage & Co. Ltd.*[3]; *Rex* v. *National Arbitration Tribunal, Ex parte Bolton Corporation*[4]; *Rex* v. *National Arbitration Tribunal, Ex parte Keable Press Ltd.*,[5] but nobody would say in the present case that the union went off on a frolic; and *Bents Brewery Co. Ltd.* v. *Hogan*,[6] in support of the view that a broad common-sense view must be taken.

The principal function of trade unions is to negotiate terms and conditions of employment, and it is difficult to see how the circumstances here can be described as anything other than a trade dispute. Archer J. said in his judgment: " The company " was insisting that no trade dispute existed and that the appoint- " ment of a board of inquiry was improper. It was saying that " its attitude had come about because what had started as the " dismissal of the employees without complaint by its workmen " had grown into a struggle with the Federated Workers' Trade " Union. . . ." How could anyone have anything more like a trade dispute! The refusal to accept a trade union as an advocate of its members is a very definite and substantial thing constituting a dispute which goes to the root of the whole matter. There was here a dispute, alternatively a difference, between the respondents and such of their workmen as were members of the union, whether the workmen should be permitted to have as their bargaining agent, or otherwise to be represented by, the union, in

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[1] [1909] A.C. 506, 509, 512, 517, 522; 25 T.L.R. 779.

[2] The Times, July 23, 1954.

[3] [1956] 1 W.L.R. 1062; [1956] 3 All E.R. 411.

[4] [1941] 2 K.B. 405; 57 T.L.R. 644; [1941] 2 All E.R. 800; (H.L.) sub nom. *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 175, 189; 59 T.L.R. 1; [1942] 2 All E.R. 425.

[5] [1943] 2 All E.R. 633.

[6] [1945] 2 All E.R. 570.

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respect of all or any matters which might possibly be the subject of union representation, and the appointment by the first appellant of the second appellant to be a board of inquiry was in every respect regular and proper and in accordance with the Ordinance.

R. W. Goff Q.C. and *Raymond Walton* for the respondents. The decision in this case is not a matter of great moment on the question of industrial relations and conciliation; this is an issue which depends on the facts of this particular case, the pleadings, and particularly on the dates. The question is, did the Governor properly exercise his powers in ordering the board of inquiry at the moment when he did it? That question does not affect the trade union position in the colony; it has to be considered as a question related to these particular facts. The only dispute that ever got constituted by April 16 was the Bobb and Simon dispute; that was a separate matter from the other dispute as to the union being the general bargaining agents, which was only just coming into being. The appellants are precluded from raising the Bobb and Simon dispute by the form of their pleadings, and this new departure by the union of asking for general recognition was not a thing which had been authorised by the men at all, and the union did not get it ratified—it cannot be inferred from the evidence that the men did ratify it. Further, if the men had authorised the union to seek recognition as their agent, and had ratified the application by the union, the dispute, if there were one, could only be a dispute between the company and the union—not between the company and its workmen, as defined in the Ordinance. The only thing the men authorised, and the only thing that was brought to the company and rejected before April 16, was this issue or question concerning Bobb and Simon.

In *Reg.* v. *Industrial Disputes Tribunal, Ex parte Courage & Co. Ltd.*,[7] on which the appellants relied as of practical application, there was express evidence that the members of the company approached the union. Again, in *Reg.* v. *Industrial Disputes Tribunal, Ex parte American Express Co.*[8] the men approached the union; and there was alleged to be widespread discontent, and a vast number joined the union. [Reference was also made to *Rex* v. *National Arbitration Tribunal, Ex parte Keable Press Ltd.*[9]] In *Bird* v. *O'Neal*[10] reference was made to *Rex* v. *National Arbitration Tribunal*,[11] in which Bennett J. said that a difference between a trade union and an employer cannot be a trade dispute. There was not on April 16, 1956, any such trade dispute as alleged by the appellants concerning the respondents in existence.

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[7] [1956] 1 W.L.R. 1062.
[8] The Times, July 23, 1954.
[9] [1943] 2 All E.R. 633.
[10] W.Ind.C.A., April 9, 1957.
[11] [1941] 2 K.B. 405, 421.

There are other aspects of the matter. The Governor did not himself inquire into the matter as he is required to do by section 8 (1) of the Ordinance. It is submitted that he is required to conduct something in the nature of a preliminary inquiry before he can refer anything to the board of inquiry, and to give the parties an opportunity of making representations—it is not put as high as saying that he ought to summon them to appear before him; it is a quasi-judicial act, not a purely executive act. He must have sufficient information to show that there is *the* trade dispute which he says is the one which he refers. He could not here have had sufficient information to reach that conclusion; there is no evidence that in relation to the general issue the Governor ever considered anything at any time. There was here much uncertainty as to what the dispute was. It is necessary that it should be clearly indicated by the Governor to the parties what it is that has to be investigated. In the circumstances of the present case the failure to specify the dispute or difference vitiates the appointment. [Reference was made to *Local Government Board* v. *Arlidge*.[12]]

Raymond Walton following. The real and sole question is whether on April 16, 1956, there was or was not a trade dispute. On the events here there was nothing even remotely approaching a trade dispute within the meaning of the Ordinance, i.e., a dispute or difference between employers and workmen. The dispute which was—not meaning to use too harsh a word—engineered by the union, which had not the backing from the men, was not a genuine dispute at all.

Sir Lionel Heald Q.C. in reply. No one can doubt that the responsible officers of the trade union were acting intra vires in seeking to have access to the members of the company. There was a dispute, or at least a difference, of a most important character, namely, a difference as to whether the union should have any access whatever on behalf of its members.

Any sort of rigidity about the inquiry by the Governor before he appoints the board of inquiry is quite mistaken. It is impossible to challenge the matters he refers if he thinks that they are relevant to the dispute.

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[12] [1915] A.C. 120, 125, 130; 30 T.L.R. 672.

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Dec. 16. The judgment of their Lordships was delivered by Lord Denning who, after stating the nature of the claim and the relevant statutory provisions as set out above, continued: Their Lordships observe that the Ordinance follows the pattern of the legislation in the United Kingdom and uses the self-same words: see section 4 (1) of the Industrial Courts Act, 1919, and the definition of " trade dispute " in section 5 of the Trade Disputes Act, 1906.

Their Lordships also observe that, although the Ordinance gives the Governor power to act, not only when a trade dispute *exists*, but also when it *is apprehended*, nevertheless in the present case the Governor was content to assert, as the basis of his jurisdiction, that a trade dispute *exists*. The minute of appointment, after reciting the Ordinance, went on to say:

" And Whereas *a dispute exists* between Trinidad Cement " Limited and certain of its workmen, members of the Federated " Workers' Trade Union.

" Now therefore the Governor by virtue of the powers vested " in him by the said Ordinance and of all other powers enabling " him in that behalf appoints Mr. Bernard B. Gillis, M.A. (Cantab), one of Her Majesty's Counsel, to constitute a Board of " Inquiry.

" And the Governor directs that the terms of reference to the " Board shall be as follows:

" (*a*) To inquire into and report on the causes and circumstances of the said dispute; (*b*) To inquire into and report on " the likely effect (if any) of the said dispute . . . upon industrial relations between employers and employed in the Colony " generally . . ."

Their Lordships draw attention to the fact that the Governor, in the minute of appointment, did not define the dispute. He did not say what it was. He left it to be gathered by those concerned from the facts known to them. To these facts therefore their Lordships now turn. [His Lordship stated the facts set out above and continued:] The principal question is this: Did a trade dispute exist on April 16, 1956? The Governor did not give any particulars of the dispute in the order which he made on that day. But he did in the pleadings in the action. The dispute, he said, was this: " Whether workmen, being hourly-paid employees in " the employment of the plaintiff company . . . should be permitted to have as their bargaining agent, or otherwise to be " represented by, the Federated Workers (or any other) Trade " Union . . ." That pleading was so comprehensive that the

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dispute might be said to be the wide question whether the company ought to permit its workmen to be represented by any trade union at all. No dispute of that width was ever proved. As the trial judge said: "Non-recognition of trade unions was something that neither of the parties had fought about and it had "been brought into the arena by the Minister without their knowledge or consent." But the Governor is not to be tied down by the wide words of the pleading. It is a well-established rule of pleading that any words in an averment can be treated as surplusage and struck out provided that, after they have been struck out, that which is left is sufficient to maintain the claim or defence, as the case may be: see *Anderson* v. *Thornton.*[1] The Governor is therefore entitled under this pleading to contend that, even though there was no dispute on the wide question, nevertheless, there was a dispute (1) "whether workmen . . . in "the employment of the plaintiff company . . . should be permitted . . . to be represented by the Federated Workers . . . "Trade Union"; or alternatively (2) there was a dispute "whether workmen . . . in the employment of the plaintiff company . . . should be permitted to have as their bargaining "agent . . . the Federated Workers . . . Trade Union."

As to the first of these alternatives, their Lordships are clearly of opinion that, following on the dismissals of Bobb and Simon, there was a dispute whether the workmen should be permitted to be represented by the union. The facts are plain enough. The union claimed to represent the two men. The company refused to recognise the union: and it did so in terms which showed that the company refused to recognise the union as being authorised to act for any men in respect of their individual grievances. The union resented this. So, indeed, did the men themselves, if their attitude at the branch meeting of March 15, 1956, is anything to go by. The only question that can arise about this dispute is whether or not it still existed on April 16, 1956. The judge thought it did not then exist. It had been relegated to the background and had become submerged in the claim of the union for bargaining status.

Their Lordships are prepared to assume that this was the case: but if so, the second alternative has to be considered: Was there on April 16, 1956, a dispute whether the workmen should be permitted to have the union as their bargaining agent? The trial judge thought not. His reasoning is to be found in this key passage of his judgment: "The issue which the union was now "seeking to raise [by its letter of March 26, 1956] was separate "and distinct from the Bobb and Simon issue . . . For the first "time the union was asking for collective bargaining status and "on the ground that it represented a substantial majority of the "company's workmen . . . There had been no ultimatum on "either side and the negotiations had not progressed beyond the "initial bargaining stage . . . The prime characteristic of a trade "dispute is deadlock and the determination on the part of both "sides to the dispute to stand firm. A mere difference in point "of view cannot by itself constitute a trade dispute, and it is "necessary that the view on each side should be persisted in to the "point of rigidity."

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[1] (1853) 8 Ex. 425.

Whilst their Lordships appreciate to the full the great ability and care which the judge brought to bear upon the case, they cannot agree with him in this part of it. By definition a trade dispute exists wherever a "difference" exists; and a difference can exist long before the parties become locked in combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening. And it seems to their Lordships that the parties had reached that point here, even in regard to the claim for bargaining status. The union had applied for bargaining status. The company had ignored the request just as it had ignored previous requests. The union had sought the mediation of the Commissioner for Labour: but, when he came forward, the company rejected his approach out of hand, just as it had rejected his previous approach. "We "have no intention of becoming involved in any way with the "union concerned." When this statement is taken in its setting—with the background of repeated refusal by the company to recognise the union over the two dismissals—the position at April 16, 1956, can be put simply thus: "Here is this union "knocking at the door of the company asking to be let in to "negotiate: and the company time and time again refusing to "open it, nay more, keeping it locked and barred against the "union." That was clearly a difference between them which subsisted at that very time.

But then it was said that this was not a difference between the company and *the workmen*, as the Ordinance requires, but only a difference between the company and *the union*: and attention was drawn to the statement by Bennett J. that a dispute between such bodies is not a trade dispute: see *Rex* v.

National Arbitration Tribunal, Ex parte Bolton Corporation.[2] To this their Lordships think that Lord Wright gave a sufficient answer when that case reached the House of Lords. He said[3]: "It would be strangely out of date to hold, as was argued, that "a trade union cannot act on behalf of its members in a trade "dispute, or that a difference between a trade union acting for "its members and their employer cannot be a trade dispute." Accepting this statement, however, it was said that in this case the trade union was not acting *for its members*, but for itself. The claim for bargaining status was never authorised or approved, so it was said, by any of the members of the branch at Claxton Bay. It was done by the head office acting on its own initiative. And reliance was placed on observations in some of the cases that if a trade union acts "on a frolic of its own," there is not a trade dispute: see *Rex* v. *National Arbitration Tribunal, Ex parte Keable Press Ltd.*[4]; *Reg.* v. *Industrial Disputes Tribunal, Ex parte Courage & Co. Ltd.*[5] Their Lordships cannot accept this argument. The claim was made by the executive committee who were by the rules entrusted with the general management of the union: and it was clearly within the scope of their authority to put forward a claim for bargaining status. If the union were able to obtain bargaining status it would be able to promote the interest of its members far better than if it were unrecognised. Moreover, the claim had been brought to the attention of the branch, who may fairly be assumed to have approved of it. The union can therefore properly be considered as acting for its members, and, in consequence, the difference was one "between "employers and workmen."

Their Lordships are glad to find that in England a Divisional Court presided over by Lord Goddard C.J. in a somewhat similar case came to a similar conclusion: see *Reg.* v. *Industrial Disputes Tribunal, Ex parte American Express Co.*[6]

There remain, however, two further points. It was said that the Governor was under the Ordinance under a duty to "inquire into the causes and circumstances of the dispute" before he appointed the board of inquiry: and that he had not inquired as he ought to have done. He ought, it was said, to have given a fair opportunity to both parties to make representations before he acted: and the familiar passages in *Local Government Board* v. *Arlidge*[7] were cited. Their Lordships reject this contention. True it is that the Governor had to inquire, and no doubt he did—in his administrative capacity—but he had not to conduct anything in the nature of a judicial or quasi-judicial inquiry.

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[2] [1941] 2 K.B. 405, 421; 57 T.L.R. 644; [1941] 2 All E.R. 800.

[3] Sub nom. *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 189; 59 T.L.R. 1; [1942] 2 All E.R. 425.

[4] [1943] 2 All E.R. 633.

[5] [1956] 1 W.L.R. 1062; [1956] 3 All E.R. 411.

[6] The Times, July 23, 1954.

Then it was said that the Governor did not make a valid reference to the board of inquiry because he did not, in the minute of appointment, specify the nature of the dispute. There is nothing in this point. If there is a dispute in existence the parties must know of it and there is no need to tell them about it. They may not be able to formulate it themselves, at that stage, or at any rate, not precisely. So how can the Governor be expected to do so? Suffice it for it to be formulated by the parties themselves when they get before the board.

Their Lordships find, therefore, nothing invalid in the appointment by the Governor of the board of inquiry. It was not null and void. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and judgment entered for the defendants with costs. The respondents must pay the costs of the appeal to Her Majesty.

Solicitors: *Charles Russell & Co.; Braby & Waller.*

C. C.

[7] [1915] A.C. 120; 30 T.L.R. 672.

[HOUSE OF LORDS.]

CAVANAGH . . . . APPELLANT; H. L. (N. I.)*

AND

ULSTER WEAVING CO. LTD. . . . RESPONDENTS.

1959
May 11, 12, 13;
June 18.

Negligence—Safe system of work—Reasonable care—General practice—"Folly" to neglect to provide precaution—Meaning of "folly." Damages—Personal injuries—Jury—Assessment of damages by jury—Whether award so excessive as to warrant interference by appellate court.

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD JENKINS.

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Cavanagh v. Ulster Weaving Co. Ltd.

Judicial Precedent—Question of fact—Jury question—Opinion of judge on it not a precedent.

Fact or Law—Negligence—Standard of care—Question of fact—Master and servant.

The plaintiff, who was employed by the defendants as a labourer, was seriously injured when he fell from a crawling ladder, which had no handrail, onto a glass roof whilst carrying a bucket of cement in the course of his employment on the roof of the defendants' factory. At the time of the accident the plaintiff was wearing rubber boots provided by the defendants, the soles of which were wet and slippery. As a result of his injuries the plaintiff's right arm had to be amputated three inches above the elbow. In an action against the defendants for damages alleging negligence and breach of statutory duty the plaintiff was awarded £6,520 by the jury, which was reduced to £5,868 in view of a finding of contributory negligence.

The plaintiff did not allege that the system adopted by the defendants for the carrying of cement on the roof was contrary to the general practice of the trade, but at the trial the defendants called expert evidence, which was not seriously challenged, that this "set-up [the system in question]" was "perfectly in accord with "good practice."

On appeal, the jury's verdict was set aside on the grounds that there was no evidence of negligence fit to be left to the jury, the plaintiff having failed to show, in the words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*, 1909 S.C. 807, 809, that "the thing "which" the employer "did not do was a thing which was commonly done by other persons in like circumstances" or "that "it was a thing which was so obviously wanted that it would be "folly in anyone to neglect to provide it." On appeal to the House of Lords:—

Held, (1) that, on the evidence, the jury was entitled to find the defendants guilty of negligence, since the evidence as to trade practice alone could not be treated as conclusive in favour of the defendants.

Observations of Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42, and of Lord Cohen in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1956] A.C. 552, 579; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385, as to the ambit of Lord Dunedin's dictum in *Morton* v. *Wm. Dixon Ltd.*, 1909 S.C. 807, 809 applied.

(2) That although the amount of damages awarded by the jury was high, it was not so extravagant as to require an appellate court to interfere with their verdict.

Per Lord Keith of Avonholm: Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. Lord Dunedin was laying down no principle of law but stating the factual framework within which the law would fall to be applied.

Per Lord Somervell of Harrow: Lord Dunedin's observation was in its context clearly only intended to apply where the practice proved was clearly proved, and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which, although the circumstances are not precisely similar, evidence of practice should be given some though less weight.

Decision of the Court of Appeal in Northern Ireland reversed.

APPEAL from the Court of Appeal in Northern Ireland (Curran L.J. and Sheil J., Lord MacDermott C.J. dissenting).

This was an appeal from a judgment of the Court of Appeal in Northern Ireland dated June 16, 1958, setting aside a verdict of a jury and judgment entered thereon on the order of Black L.J. dated January 21, 1958, awarding the plaintiff, Michael Cavanagh, £5,868 damages for injuries, on the ground that those injuries resulted from the negligence and breach of duty of his employers, the defendants, the Ulster Weaving Co. Ltd.

The facts are taken substantially from the judgment of Lord MacDermott C.J. in the Court of Appeal.

On October 27, 1953, the plaintiff met with a serious accident while working on the roof of a factory at Linfield Road, Belfast, which was owned and occupied by his employers, the defendants. The plaintiff was a labourer and his task at the time in question was to act as helper to a man called Reilly who was engaged in pointing ridge-tiles. This required the use of a cement mix and it was the plaintiff's job to bring the cement up in a bucket from the yard where it was mixed to the part of the roof at which Reilly was working. The weight of a full bucket, some three stone, was a sufficient burden to engage one hand fully and to place certain restrictions on the plaintiff's movements and posture as he made his way along the roof to the place where the cement was needed.

This roof was of a usual factory type. It consisted of a series of transverse ridges, each a pitched roof in itself with one aspect slated and the other glazed and the apex, where the glazing and the slates came together at the top, covered by ridge-tiles. The other apex, the point at the bottom from which the slated aspect of one ridge and the glazed aspect of its immediate neighbour arose, formed a gutter along which it was possible to walk. To get from where he gained access to the roof to where Reilly was at work the plaintiff had to make his way along a path or gangway of planks laid across the transverse ridges. Then, when he

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came to the ridge the tiles of which Reilly was pointing, he had to get down into the gutter between that ridge and the next so that he might proceed along the gutter to where Reilly was working on an ordinary ladder placed flat against the roof. To provide a means of getting from the plank gangway which lay across the roof ridges to the gutter below there was a roof ladder, or a crawling ladder as it was also called. This ladder was about 11 feet long. It lay flat against the slated aspect, which was 9 feet 6 inches in length, with one end in the gutter and the other projecting a foot or so beyond the ridge-tiles. It consisted of two lengths of wood $\frac{7}{8}$ of an inch thick, connected by flat rungs which were about 1 inch thick. The upper surface of each rung was therefore about $1\frac{7}{8}$ inches from the slates. To the plaintiff walking along the plank gangway with his bucket of mix this roof ladder ran down before him to his right and close to the gangway. To get where he was going he had to step onto the ladder at this point and go down it to the gutter. The slope of the slated aspect, and therefore of the roof ladder, was one of 37° to the horizontal. While he was descending, the plaintiff was faced with the glazed aspect of the next ridge. This glazing was carried between metal glazing bars about 2 feet apart and running up from near the gutter to near the ridge-tiles. There were two skins of glass about 1 inch apart. That outside was of obscured "Artic" glass; that inside was of wire-reinforced glass.

The plaintiff had been working on this roof for three or four weeks before the accident and had carried a bucket full of cement down this roof ladder on many occasions. He did so facing the glass and with his back to the slates. This was the ordinary way of making the descent when carrying a burden. With the hands free it would have been possible to crawl down facing the slates, but that was not regarded as a practicable method when a bucket of cement had to be carried in one hand.

The accident happened about 3.30 p.m. In the morning the plaintiff had been wearing shoes but it became wet in the gutters and the foreman had given him a pair of rubber boots to wear instead. These he had on when injured. On getting to the roof ladder the plaintiff left his bucket of cement down on the plank gangway and stepped onto the second or third rung of the ladder. Then he turned and picked up the bucket and was about to descend to the gully when, as he described it, "my feet just "left me and I hit the glass with my right side." The plaintiff did not fall through the glass, but he broke it and was severely lacerated and his right arm had to be amputated above the elbow.

The plaintiff alleged negligence and breach of statutory duty against the defendants. The allegations of breach of statutory duty were founded on alleged contraventions of subsections (1) and (2) of section 27 of the Factories Act (Northern Ireland), 1938, and of certain of the Building Regulations (Northern Ireland), 1950. At the close of the plaintiff's case counsel for the defendants requested the trial judge, Black L.J., to withdraw the case from the jury on the grounds that there was no evidence of negligence or breach of statutory duty. They cited *Paris* v. *Stepney Borough Council*[1] and *Bolton* v. *Stone*.[2] The plaintiff's counsel, in opposing the application, cited *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[3] Black L.J., while holding that the building regulations relied on by the plaintiff did not apply (a ruling accepted in the Court of Appeal), refused to withdraw the case from the jury on the other grounds. The questions submitted to the jury and the answers thereto were as follows:

"Q. 1. Were the defendants guilty of negligence? A. Yes.

"Q. 2. If the answer to question 1 is 'Yes' was the plaintiff's injury caused either wholly or partly by the defendants' negligence? A. Partly.

"Q. 3. Was there provided so far as was reasonably practicable safe means of access from the ridge of the roof to the gutter? A. No.

"Q. 4. If the answer to question 3 is 'No' was the plaintiff's injury due either wholly or partly to failure to provide such safe means of access? A. Partly.

"Q. 5. Was the plaintiff liable to fall a distance of more than ten feet? A. Yes.

"Q. 6. If the answer to question 5 is 'Yes' did the place afford secure foothold and if necessary secure handhold? A. No.

"Q. 7. If the answer to question 6 is 'No' was the plaintiff's injury due either wholly or partly to failure to afford secure foothold or if necessary secure handhold? A. Partly.

"Q. 8. Was the plaintiff's injury due partly to his own fault? A. Yes.

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[1] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[2] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[3] [1956] A.C. 552; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.

"Q. 9. What damages would the plaintiff be entitled to "recover on the basis that the defendants were wholly responsible for the accident? A. £6,520.

"Q. 10. If the answer to question 8 is 'Yes' to what net "sum is it just and equitable that the amount mentioned in "the answer to question 9 should be reduced having regard to "the plaintiff's share in the responsibility for the damage? A. "£5,868."

The defendants appealed on the grounds that there was no evidence to support the findings of negligence and breach of statutory duty; that the trial judge was wrong in law in holding that subsection (1) or subsection (2) of section 27 of the Act of 1938 was applicable; and that the damages found were excessive and could not reasonably have been awarded on the evidence. The plaintiff in his statement of claim did not allege that the defendants were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. At the trial, however, the defendants called as an expert a civil engineer who was asked the question: "How far does this set-up accord with good practice?" He answered: "For the type of access to building work I would "say that it is perfectly in accord with good practice. I have "very considerable experience of such work on roofs for over "20 years."

In view of that evidence, which was not seriously challenged, the Court of Appeal by a majority (Lord MacDermott C.J. dissenting) allowed the appeal since, in the words of Curran L.J., "a jury would not be justified in finding that the defendants "were lacking in reasonable care for the safety of the plaintiff "in providing such a set-up." The judgments of Curran L.J. and Sheil J. were based on the view that the plaintiff had failed to show, in the words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*,[4] "that the thing which he [the employer] did not "do was a thing which was commonly done by other persons "in like circumstances" or "that it was a thing which was "so obviously wanted that it would be folly in anyone to neglect "to provide it."

The plaintiff appealed.

Cyril A. Nicholson Q.C., *Charles Stewart Q.C.* and *J. P. Higgins* (all of the Northern Ireland Bar) for the plaintiff.

[4] 1909 S.C. 807, 809.

Reliance is placed on the following propositions: (1) Where there is evidence of acts done by an employer creating a dangerous situation which was reasonably foreseeable, the necessity of proof enjoined by Lord Dunedin's formula in *Morton* v. *Wm. Dixon Ltd.*[4] does not arise. (2) The evidence treated by the majority in the Court of Appeal as establishing a trade practice was not binding on the jury.

The verdict of a jury on a question of negligence will not be set aside unless there was no evidence which could reasonably have been left to it: *Metropolitan Railway Co.* v. *Jackson.*[5] Further, cases should be decided on appeal upon the questions raised at the trial, and none other: *Kennan* v. *Murphy*[6] and *Russell* v. *Moore.*[7] As to the dangers of deducing general principles of law from the particular facts of particular cases dealing with negligence, see *Qualcast (Wolverhampton) Ltd.* v. *Haynes.*[8]

The jury were not bound by the evidence as to trade practice given by the defendants' expert witness, but they were *bound* to *consider it* and were then entitled either to accept or reject it. If it were to become the rule that whenever uncontradicted evidence as to trade practice were given, Lord Dunedin's formula[9] was automatically applicable and the question of negligence withdrawn from the jury, it would follow that a practice, however bad, could not be inquired into by the courts. Such a result would reduce to naught the observations of Lord Herschell in *Smith* v. *Baker & Sons*[10] that the duty which an employer owes to his servant is "the duty of taking reasonable care to provide "proper appliances, and to maintain them in a proper condition, "and so to carry on his operations as not to subject those "employed by him to unnecessary risk." To those observations should be added the rider of Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[11] that it is also "a duty not to subject the "employee to any risk that the employer can reasonably foresee "and which he can guard against by any measures, the con-"venience and expense of which are not entirely disproportionate "to the risk involved." This duty was not discharged by the defendants, because (a) a roof ladder was provided which gave inadequate foothold; (b) the plaintiff was provided with boots which accentuated the risk of falling from the ladder. In the present case there was a potential risk of the plaintiff suffering grave injury under the conditions in which he had to work.

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[4] 1909 S.C. 807, 809.

[5] (1877) 3 App.Cas. 193.

[6] (1880) 8 L.R.Ir. 285, 295, 296.

[7] (1881) 8 L.R.Ir. 318, 345, 346.

[8] [1959] A.C. 743; [1959] 2 W.L.R. 510; [1959] 2 All E.R. 38.

[9] 1909 S.C. 807, 809.

[10] [1891] A.C. 325, 362; 7 T.L.R. 679.

[11] [1953] 1 Q.B. 617, 626; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

As to the reasonableness of the jury's view of the evidence, "the whole of the evidence" must be examined, and unless it can be said that the plaintiff's testimony "cannot be accepted, "because all the evidence is the other way, the case must be "left to the jury. . . . An enormously strong case is needed "before the Court of Appeal can say that though there is evidence "given by a witness it cannot reasonably be believed by the jury. "Unless" the court gets "such a case as that," it "must "assume, in considering the question whether there is any "evidence on which the jury could reasonably find a verdict for "the plaintiff, that they accepted the evidence in favour of the "plaintiff and disbelieved the evidence given in favour of the "defendant": *per* Scrutton L.J. in *Place* v. *Searle*.[12] In the present case there is a finding by the jury that the roof ladder in the situation in which it was used was dangerous and that the defendants knew this (as indeed they must be deemed to have known). In those circumstances, negligence is established against the defendants: see *per* Atkin L.J. in *Monaghan* v. *W. H. Rhodes & Son.*[13]

As to Lord Dunedin's test,[14] it is submitted that it is confined to clear faults of omission and does not extend to positive acts. Here the negligence complained of consisted, partly, in the performance of a positive act, namely, the provision by the defendants of unsuitable rubber boots. It was a question for the jury to determine whether the supply of such boots constituted negligence. The majority of the Court of Appeal's view as to the conclusiveness of the evidence as to practice is contrary to the observations of Lord Morton of Henryton and Lord Cohen in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*,[15] of Lord Simonds in *Paris* v. *Stepney Borough Council*,[16] of Lord Oaksey and Lord Reid in *General Cleaning Contractors Ltd.* v. *Christmas*[17] and of Lord Normand in *Barkway* v. *South Wales Transport Co. Ltd.*[18]

On the question of breach of statutory duty, reliance is no longer placed on section 27 (2) of the Act of 1938. As to section 27 (1), "There shall, so far as is reasonably practicable, be pro-"vided and maintained safe means of access to every place at "which any person has at any time to work," the same question arises as under the common law aspect of the case, namely, was there evidence from which inferences might be drawn as to the liability or otherwise of the defendants? The rubber boots are a circumstance which have to be taken into account in considering whether there was a breach of section 27 (1). The observations of Parker L.J. in *Trott* v. *W. E. Smith* (*Erectors*) *Ltd.*[19] are adopted as the test to be applied in determining the safety of a means of access. As to the practicability of the precautions to be taken, see *per* Lord Reid in *Marshall* v. *Gotham Co. Ltd.*[20]

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[12] [1932] 2 K.B. 497, 514, 515; 48 T.L.R. 428.

[13] [1920] 1 K.B. 487, 498.

[14] 1909 S.C. 807, 809.

[15] [1956] A.C. 552, 560, 579.

[16] [1951] A.C. 367, 377.

[17] [1953] A.C. 180, 190, 193, 194; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

[18] (1950) 66 T.L.R. (Pt. 1) 597, 606; [1950] 1 All E.R. 392.

F. A. L. Harrison Q.C., *Robert Lowry Q.C.* and *C. B. Shaw* (all of the Northern Ireland Bar) for the defendants. (1) The first question is: at the trial, was there any evidence of negligence connected with the accident which could be left to the jury? To put the matter differently: on the burden of proof had the plaintiff put his case beyond equilibrium so that it could go to the jury? Reliance is placed on the words of Lord Cairns L.C. in *Metropolitan Railway Co.* v. *Jackson*[21]: "I do not find any "evidence from which, in my opinion, negligence could reason-"ably be inferred. The negligence must in some way connect "itself, or be connected by evidence, with the accident. It must "be, if I might invent an expression founded upon a phrase in "the civil law, incuria dans locum injuriae."

(2) The same principle applies even after the jury have given their verdict, because the position in law is unaltered by that verdict, and the same question has to be posed on appeal as at the trial, namely, whether there was evidence from which an inference of negligence could properly be drawn. The omission on the part of the defendants to ask the judge at the trial to nonsuit the plaintiff on the ground that there was no evidence upon which the jury could reasonably find for the plaintiff does not preclude an appellate court from entertaining the question of no evidence: *Banbury* v. *Bank of Montreal.*[22] A fortiori where, as in the present case, the defendants made such a submission to the trial judge.

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[19] [1957] 1 W.L.R. 1154, 1162; [1957] 3 All E.R. 500.

[20] [1954] A.C. 360, 372, 373; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[21] 3 App.Cas. 193, 198.

[22] [1918] A.C. 626; 34 T.L.R. 518.

(3) Where a plaintiff is attacking a system of work, he must make specific allegations in his pleadings and at the trial to show that there was something done or omitted to be done by the defendants which affected the safety of the system and which caused the accident. That is, cases must be decided on evidence and the evidence must be confined to specific allegations in the particulars given. Unless the plaintiff makes specific allegations against the system the danger is that at the trial the issues will not be knit. In the present case the issues were not knit and no attempt was made either in the evidence called by the plaintiff or in cross-examination to prove the case being made on appeal.

(4) The defendants do not dispute that the main question in this appeal is whether on all the evidence it can be said that the plaintiff has alleged and proved that the circumstances of this accident differentiated it from the established practice for carrying out the work on which the plaintiff was engaged on roofs of this kind. In the circumstances, since the defendants' evidence as to practice was not challenged in cross-examination, the plaintiff must be taken to have approved it, and, accordingly, there was no case at all to go to the jury.

(5) The last question raises the point of the standard of proof required before the plaintiff can get his case to the jury. At the trial the only allegations of lack of precautions by the defendants were the failure to provide a handrail to give support and failure to provide protection against the possibility of a workman falling onto glass. But these allegations were not in the pleadings. The defendants concede that if, contrary to their submission, there was evidence that they were guilty of an act of commission, they have no case. But if the evidence only points to acts of omission, then Lord Dunedin's test [23] is very relevant. The first limb of the test applies the standard of the reasonable man, but in the second limb the test of reasonableness does not apply; a very bad act of omission is intended by the use of the word "folly."

The whole basis of the Dunedin principle is that a plaintiff has an opportunity *either* to show a departure or deviation from common practice (if he cannot or does not do that, the presumption is that the defendant is following the common practice), *or* he must prove that the defendants' acts amounted to more than mere unreasonable conduct. In the present case the plaintiff did not satisfy the first limb of the test, for at the conclusion of his case he had called no evidence as to practice, and he did not call evidence as to folly as required by the second limb. The defendants called evidence as to common practice and the plaintiff did not challenge it; therefore, on this point, the evidence was in the same state as at the conclusion of the plaintiff's case, and, accordingly, the plaintiff had not discharged the burden of proof.

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[23] 1909 S.C. 807, 809.

If, as is contended, departure from common practice in the first limb of the test amounts to common law negligence, then if the word "folly" in the second limb be construed as meaning "unreasonable," that would destroy the alternative that the formula plainly poses. The second limb is directed not so much to the individual employer as to the practice, that is, to a *multiplicity of persons* following a practice. Where there has been an accident, which was foreseeable, the employer is not to be penalised because he has not been a pioneer in adopting a different system; he is liable only in those circumstances if his omission to take the necessary precautions can be said to amount to folly as defined above. *General Cleaning Contractors Ltd.* v. *Christmas* [24] is an example of a decision which, although it did not specifically refer to the Dunedin principle, was clearly based on the "folly" of the lack of a proper system of work. The following are among the cases which have discussed the Dunedin principle: *Gallagher* v. *Balfour, Beatty & Co.*[25]; *Paris* v. *Stepney Borough Council* [26]; *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[27]; *Barkway* v. *South Wales Transport Co. Ltd.*[28] It is a principle of general application and has not been whittled down or "explained." It has the authority of the House of Lords and must be considered to have almost the status of a rule of law in giving guidance as to what should go to the jury or, to use a term in Scottish law, as to what should be submitted to proof.

As to the question of breach of statutory duty under section 27 (1) of the Act of 1938, the provision of rubber boots does not give rise to any question of breach of statutory duty. The employer's duty is to provide a safe means of access, and this duty does not vary because of the existence of adventitious circumstances at any particular time, for example, that at certain times the employee might have to wear particular articles of clothing or footwear. It is to be noted that what has to be provided is a means of access which is reasonably practicable, not merely

[24] [1953] A.C. 180, 186, 191, 192, 194, 196, 198.

[25] 1951 S.C. 712, 714, 716, 718, 719.

[26] [1951] A.C. 367, 382, 387.

[27] [1956] A.C. 552, 557, 558, 560, 568, 570, 571, 578.

[28] 66 T.L.R. (Pt. 1) 597, 606.

possible; many things are possible which may not be reasonably practicable. For this purpose the question of practicability has to be considered in relation to the conditions subsisting immediately prior to the accident: see *per* Lord Oaksey in *Marshall* v. *Gotham Co. Ltd.*[29] As to what is meant by "reasonably "practicable," see *per* Parker J. in *Adsett* v. *K. and L. Steelfounders and Engineers Ltd.*,[30] and *per* Lord Reid and Lord Tucker in *Marshall* v. *Gotham Co. Ltd.*,[31] where "reasonably "practicable" was equated with what is reasonably necessary.

The sum awarded as damages was out of all proportion to the injuries sustained.

[Reference was also made to regulation 31 of the Building Regulations (Northern Ireland), 1950, and to *Trott* v. *W. E. Smith* (*Erectors*) *Ltd.*[32]]

Lowry Q.C. following. If the provision of the rubber boots amounted to negligence, it was an affirmative act of negligence with which the rule in *Morton* v. *Wm. Dixon Ltd.*[33] has nothing to do. In all negligence cases the duty is to take reasonable care, but the degree of care required in a particular case depends on the accompanying circumstances. The question posed in *Morton* v. *Wm. Dixon Ltd.*[33] is how should the duty of care be measured where a fault of omission is alleged? It explains, but does not displace, the standard of reasonable care. The rule shows that the employer is not required to be an innovator, but the employer gets no sympathy if it is proved that the system of work he has adopted falls below the normal standard. The rule is a rule of law; it operates (a) to give guidance to the judge when he is considering taking the case away from the jury on the grounds that on the evidence given the jury could not reasonably find for the plaintiff under either limb of the rule; (b) as a direction to the jury where there is evidence of negligence fit to be left to them. It is a test of relevance in Scotland: *Gallagher's* case.[34] In the present case the defendants did not neglect to provide anything which was so obviously wanted that it would have been folly not to provide it; accordingly, the judge should have withdrawn the case from the jury. [Reference was made to *Young* v. *Rank*.[35]]

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[29] [1954] A.C. 360, 369.

[30] [1953] 1 W.L.R. 137, 141; [1953] 1 All E.R. 97; affirmed [1953] 1 W.L.R. 773; [1953] 2 All E.R. 320.

[31] [1954] A.C. 360, 372, 374, 376.

[32] [1957] 1 W.L.R. 1154, 1162.

[33] 1909 S.C. 807, 809.

[34] 1951 S.C. 712.

[35] [1950] 2 K.B. 510; 66 T.L.R. (Pt. 2) 231; [1950] 2 All E.R. 166.

In relation to breach of statutory duty, see *McCarthy* v. *Coldair Ltd.*[36] and *Taylor* v. *R. & H. Green and Silley Weir Ltd.*[37]

Nicholson Q.C. in reply. The only question remaining at the end of the case was whether there was any evidence on which 12 reasonable persons could come to a verdict in favour of the plaintiff. The equilibrium test is not accepted; the *whole* of the evidence in the case has to be taken into consideration.

As to the complaint that the defendants did not know the case they had to meet because the pleadings only contained allegations of a general nature, the answer is that the defendants had the obvious remedies of either asking for further and better particulars or asking the judge at the trial for an adjournment, but they took neither of those steps.

As to the Dunedin formula, the first part of the test only applies if the employer shows that he has acted in accord with the general practice of everyone else in like circumstances. The defendants' expert witness's evidence of general practice has no application to the facts of the present case, because it could not be said that the practice of which he spoke was in like circumstances to the present case, since he was considering only access on roofs generally and not taking into consideration the presence of the unprotected glass or the wearing of wet rubber boots or the carrying of a full bucket of cement by the person using the ladder. Further, even if, as the defendants contended, the onus referred to by Lord Dunedin rested on plaintiffs in cases of faults of omission, it only rests where a general and well-established practice is proved and where a plaintiff would have reasonable opportunity of leading evidence to show what the practice was in circumstances similar in all respects to those existing in the case. The rule is a rule of evidence to be applied in appropriate cases. It is not to be considered a departure from the common law principles of negligence. Where one finds the formula invoked, and in consequence there is a departure from the principle of reasonable care, the formula has been misapplied. [Reference was made to *Paris* v. *Stepney Borough Council.*[38]]

As to breach of statutory duty, the employer must take all normal foreseeable circumstances into account in providing a safe means of access. [Reference was made to *McCarthy* v. *Coldair Ltd.*[39]]

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[36] [1951] 2 T.L.R. 1226, 1228; [1951] W.N. 590.

[37] [1951] 1 Lloyd's Rep. 345, 348, 349.

[38] [1951] A.C. 367, 384.

[39] [1951] 2 T.L.R. 1226, 1228.

On the question of damages, there is no ground which would justify an appellate court in interfering with the jury's award.

Their Lordships took time for consideration.

June 18, 1959. VISCOUNT SIMONDS. My Lords, I have been privileged to read the opinion which my noble and learned friend, Lord Tucker, is about to deliver, and I concur in it. The evidence given by the expert called for the defence in regard to what was called "the set-up," which was not seriously or, perhaps, at all challenged, was of very great weight, but I cannot say that it was so conclusive as to require the learned trial judge to withdraw the case from the jury. There were other matters also which they were entitled to take into consideration, and it was for them to determine whether in all the circumstances the respondents had taken reasonable care. I do not think that the learned judges of the Court of Appeal were justified in concluding that reasonable men might not find the verdict which this jury found. If I may respectfully say so, I think that the error of the majority of the court lay in treating as conclusive evidence which is not conclusive, however great its weight, particularly where it has to be weighed against other evidence. But that does not mean that the familiar words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*,[1] which have been so often quoted both in Scottish and English cases, are not to be regarded as of great authority in determining what is in all the circumstances reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice. system or set-up, call it what you will, which has been widely used without complaint, could not rely on it as at least a prima facie defence to an action for negligence, and I would say with the greatest respect to those who think otherwise, that it would put too great a burden on him to require him to prove that the circumstances of his own case were "precisely" similar to those of the general practice that I have assumed. But these are not questions that arise on the present appeal, and I am content to move that the appeal be allowed with costs here and below.

LORD TUCKER. My Lords, the evidence before the jury, viewed. as it must be, in the light most favourable to the plaintiff, has been described in detail in the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland, and I do not propose to do more than point out what, in my view, the jury may have considered its salient features.

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[1] 1909 S.C. 807, 809.

The plaintiff was carrying a bucket of cement, weighing some 3 stone, down a roof ladder laid flat against the slated aspect of a slanting roof. He had come along a gangway of planks laid across the transverse sides of the roof and had put the bucket down on the plank before starting to descend the ladder, facing forwards; having placed his feet in position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and, in so doing, he slipped and fell a distance of some 6 feet against the sloping glass roof opposite him. He was wearing rubber boots which had been provided for him by the defendants in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder. A pair of boots was put in evidence by the defendants during the plaintiff's evidence without objection, and though never strictly proved by the defendants as being the actual boots worn by the plaintiff at the time of the accident, were accepted by him as similar to those which he was wearing. There was evidence that these boots were in fact two sizes larger than they should have been for a man with feet the size of the plaintiff's. The ladder down which he had to descend was at an angle of approximately 37 degrees, and its rungs were about $1\frac{7}{8}$ inches from the slates of the roof. There was no handrail with which the plaintiff could support himself with one hand as he descended with the bucket in the other hand, nor was there any protection to save him from the glass in the opposite roof if he should slip, which was a contingency made more probable in the case of a man wearing rubber boots two sizes too big with wet soles. The jury had before them a model of the ladder and were given a demonstration of how the boots would fit on to the rungs.

My Lords, in this summary of the facts I have purposely omitted one piece of evidence, viz., that given by an expert called for the defence with regard to practice. It was this evidence which the majority of the Court of Appeal in Northern Ireland considered decisive in favour of the defendants' case. I will return to it later. For the moment I will deal with the submission of counsel for the defendants that, apart from any evidence as to practice, the trial judge should have ruled that there was no evidence of negligence fit to be left to the jury. This submission was based partly on the ground that the plaintiff had never specifically alleged in his pleading that a handrail or handhold should have been provided, nor had he set out precisely what positive safeguards should have been provided, and in part to an answer given by the plaintiff to the judge to the effect that there was no connection between the accident and the rubber boots.

With regard to the pleading, it had been alleged that safe means of access to his work had not been provided, that he had been required and permitted to descend the ladder whilst carrying a bucket of cement without adequate or any means of supporting or steadying himself, and that a safe system of work had not been provided whereby, inter alia, the plaintiff would not have been required or permitted to use a ladder which, owing to its position and condition, was an unsafe means of communication.

Evidence was given by an expert witness for the plaintiff that there was nothing that a man could hold on to walking down, and the expert for the defence stated in cross-examination that for a man wearing rubber boots which were wet, and carrying a bucket of cement, it would be desirable that he should have a handhold. In this state of the pleadings and evidence I have no doubt that the trial judge would have been wrong if he had withdrawn from the jury the absence of a handrail or handhold as an element proper for their consideration in all the circumstances of this case.

With regard to the rubber boots, the trial judge's report of the evidence shows that the plaintiff, in answer to a question from the judge, said: "There is no connection between the "accident and the rubber boots." It was argued that this answer ruled out the rubber boots from consideration as having any bearing on the case. The judge, in a note at the end of his report, says that the plaintiff, whilst giving his evidence frankly and candidly, sometimes gave his answers without sufficient consideration, and referring specifically to the answer cited above said that if the plaintiff had really addressed his mind to the matter he would probably have answered quite differently. However this may be, the answer should not be considered in isolation. The witness had just previously said: "I say the boots could "have caused the accident." Later he said: "What caused "the accident was me walking in the gully in the wet and the "roof ladder being slippery." Your Lordships have not seen a shorthand note of the evidence, and do not therefore know the precise form of the questions which elicited these answers. The jury saw and heard the witness and were, in any event, entitled to form their own view of the cause or causes of the accident in the light of all the evidence. In my view, neither of the submissions referred to above can be sustained.

My Lords, this brings me to what is a more important part of the case, namely, the evidence as to practice, and the views of the majority of the Court of Appeal as to the effect of this evidence. The plaintiff in his statement of claim had not alleged that the defendants were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. The defendants called as an expert a civil engineer, who was asked this question. "How far does this set-"up accord with good practice?" He answered: "For the type "of access to building work I would say that it is perfectly in "accord with good practice. I have very considerable experience "of such work on roofs for over 20 years." I would draw attention to the fact that the words "this set-up" came from counsel, and it was never explained precisely what constituted "the set-"up," and in particular whether the practice which he described as "good" included the use of rubber boots such as those produced in evidence. It was said that this evidence stood unchallenged, but as I read the note of the cross-examination it looks as if it may have been directed in part, at any rate, to stress the use of the rubber boots as a feature peculiar to the present case to distinguish it from general practice. However this may be, and whatever is the proper view of the effect of Lord Dunedin's well-known words in *Morton* v. *Wm. Dixon Ltd.*,[2] it was for the jury to assess the value to be attached to such sketchy evidence as this, given without any explanation as to what was covered by the words "set-up." They may well have considered it insufficient, more especially if they attached importance to the use of wet rubber boots on a ladder of this kind.

Assuming, however, that the practice spoken to should be read as including the use of wet rubber boots on this ladder, what is the bearing of such evidence on the ultimate decision of judge or jury?

My Lords, I have already expressed my views on the value of this kind of evidence in *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*,[3] which I need not repeat, but it was not necessary for me in that case to refer to the language of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*[4] I would, however, desire to express my agreement with what was said by my noble and learned friend, Lord Cohen, in *Morris's* case [5] where, after reviewing what had been said on this subject in *Paris* v. *Stepney Borough*

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[2] 1909 S.C. 807, 809.

[3] [1956] A.C. 552, 576; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.

[4] 1909 S.C. 807, 809.

[5] [1956] A.C. 552.

Council,[6] and considering the language used by Parker L.J. in the case under consideration,[7] he said [8]: " I think that the effect " of their Lordships' observations is that when the court finds " a clearly established practice ' in like circumstances ' the practice weighs heavily in the scale on the side of the defendant, " and the burden of establishing negligence, which the plaintiff " has to discharge, is a heavy one." And later he equates the word " folly " as used by Lord Dunedin and Lord Normand to " unreasonable or imprudent," thereby emphasising that Lord Dunedin could not have been intending to extend the employer's common law liability beyond that which had been laid down in *Smith* v. *Charles Baker & Sons* [9] and many subsequent cases in this House. To give to the word " folly " any other meaning would necessarily have this result. This is made plain by the submission of the defendants' counsel in the present case to the effect that, even if the evidence might otherwise warrant a finding of want of reasonable care, the case should have been withdrawn from the jury on the ground that, as a matter of law, it could not, in view of the evidence of practice, be held to amount to " folly."

My Lords, I would respectfully accept the statement of the law on this subject in the present case by the Lord Chief Justice (Lord MacDermott) who, it may be observed, was a party to the decision in *Paris* v. *Stepney Borough Council* [10] in your Lordships' House. Curran L.J., who with Sheil J. formed the majority in the Court of Appeal, took the view that once practice was established this was conclusive in favour of the defendants. He said that where positive evidence is adduced for the defendant that an employer has not omitted to do anything that is commonly done by other persons in like circumstances " such a fact is clearly " relevant and once it is established it is my opinion that a " finding by the jury that it was folly in the defendants to neglect " to provide something else cannot be justified." Counsel for the defendants did not seek to support this as a correct statement of the law.

Sheil J. appears to have considered the system apart from the rubber boots and reached the conclusion that it could not be considered folly to omit to provide a handrail. As to the boots he said: " It may well be that these boots were the cause " of this accident and Black L.J. thought they were a cause,

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[6] [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[7] [1954] 2 Lloyd's Rep. 507, 518.

[8] [1956] A.C. 552, 579.

[9] [1891] A.C. 325; 7 T.L.R. 679.

[10] [1951] A.C. 367.

" but it is too much to attribute to the defendants responsibility " for an accident thus caused." I do not think the rubber boots can be eliminated from the case. They had to be taken into consideration with all the other circumstances. Furthermore, I do not think the learned judge gave sufficient weight to the fact that he was setting aside a verdict of a jury and not reviewing a decision of a judge sitting alone.

For these reasons I would allow this appeal on the ground that the jury's verdict on common law negligence should not have been disturbed. In these circumstances I do not think it is necessary or desirable to express a concluded view on the defendants' liability under section 27 (1) of the Factories Act (Northern Ireland), 1938, which is the only other ground of liability now relied upon. The question whether the provision of rubber boots constitutes a part of " the means of access " to the place of work raises a question of some difficulty which it may be better to decide if and when it arises in a case in which it is possible to ascertain whether or not the tribunal of fact regarded them as the sole or a contributory cause of the accident in question.

There remains only the question of damages. The defendants contend that the jury's assessment of £6,520 (reduced to £5,868 by reason of the plaintiff's contributory negligence) should be reduced on the ground that it was excessive. The plaintiff's right arm was badly lacerated and after two or three weeks was amputated three inches above the elbow. He suffered much pain during the unsuccessful efforts to save the arm. The stump was healed before he left hospital. He wears an artificial limb and artificial hand. When examined by a doctor in January, 1958, over four years after the accident, he complained of coldness towards the end of the stump. This condition was confirmed by the doctor, who thought it unlikely to improve. He was aged 20 at the time of the accident and was employed as a labourer at £4 15s. a week. His loss of wages down to the date of trial amounted to £180, by which time he had obtained employment as a gateman at £5 7s. In addition to the pain and suffering and the permanent diminution in his enjoyment of some of the amenities of life the jury had, of course, to consider what he might reasonably have been expected to earn during a working life of perhaps 45 or 50 years, taking account of the fall in the value of money, the tendency for wages to rise and the possibility of his improving his status in the labour market contrasted with his present position and future prospects in the event of an increase in the number of unemployed. When all these matters have been weighed in the balance and finally evaluated most favourably for the plaintiff, the figure of £6,500 is appreciably higher than I should have thought it proper for a judge to award. But your Lordships are not dealing with the award of a judge with whose estimate of damages an appellate court, though slow to interfere, is entitled and indeed bound to reconsider by way of rehearing. I do not think that the present award is so extravagant as to compel your Lordships to infer that the jury, properly directed as is admitted, must have taken into consideration matters which were inadmissible or irrelevant and arrived at an estimate which no twelve reasonable men could have reached so as to require your Lordships to order a new trial on the question of damages. On this part of the case also I am in agreement with the view expressed by the Lord Chief Justice.

Since writing the above I have had an opportunity of reading the opinion which is to be delivered by my noble and learned friend Lord Somervell of Harrow, and I desire to express my agreement therewith.

I would accordingly allow the appeal and restore the judgment of the trial judge in accordance with the verdict of the jury.

Lord Keith of Avonholm. My Lords, I agree that this appeal should be allowed substantially for the reasons given in the speech delivered by my noble and learned friend Lord Tucker. We are concerned here, in my opinion, with an act or acts of commission and it was conceded that, if this were so, much of the argument presented by counsel for the respondents disappears. The plaintiff was, in my opinion, in the circumstances of this case, placed in some peril by the acts of the respondents, his employers. He was far from being an experienced man in roof work. He had not worked on roofs until his employment on this particular job some three or four weeks before the accident. He was faced with carrying a heavy bucket of cement, down a roof (or crawling) ladder, in an upright position on a slope of 37 degrees without any adequate handhold and wearing rubber boots which were wet and would naturally tend to slip from the somewhat precarious grip which his heels had on the rungs of the ladder and which, further, were probably two sizes too large for him. The boots were supplied by the defendants' foreman, who must have had full knowledge of the circumstances in which the plaintiff was working. I am quite unable to hold that there was no evidence on which the jury could hold, as they did, that the defendants were negligent. If this is so, it is unnecessary to consider the statutory breach on which the plaintiff also relied.

I would add, however, a few words on the Dunedin formula, as it was called, in *Morton* v. *Wm. Dixon Ltd.*,[11] particularly as I was a member of the court which had occasion to consider that formula in *Gallagher* v. *Balfour, Beatty & Co.*[12] The dictum of Lord Dunedin was used with reference to an alleged act of omission in providing a safe system of work. In the sphere of negligence, in the relationship of master and servant, I find the border line between acts of omission and acts of commission very fine. It might be said to be an act of commission to put an employee to work in a place which was obviously unsafe. In the present case it might be that giving the plaintiff rubber boots for his work could have been neutralised by providing some countervailing precaution which would exclude any charge of negligence and so it might be suggested that the cause of the plaintiff's injury was an act of omission rather than of commission. The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle. All that Lord Dunedin meant, in my opinion, was that if a plaintiff was complaining of a particular act of omission as constituting negligence, there were two ways in which he might endeavour to show this: by proving that the omission complained of was a precaution commonly undertaken by others in like circumstances, or was so obvious "that it would be folly in anyone to neglect to provide "it." It is on the second alternative that discussion has generally turned. But I see no particular difficulty. There is no magic in the word "folly." It gives the formula the characteristic that was described by Lord Normand in *Paris* v. *Stepney Borough Council*[13] as "trenchant." But the language could be phrased otherwise without any loss of meaning. Lord Dunedin might equally have said: "It would be stupid not to provide it," or "that no sensible man would fail to provide it," or "that common sense would dictate that it should be provided." Lord Cooper himself, who was particularly averse from watering down Lord Dunedin's language, on three separate occasions in his judgment in *Gallagher*[14] used "inexcusable" as the equivalent of "folly." With this may be read the passage from Lord

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[11] 1909 S.C. 807, 809.

[12] 1951 S.C. 712.

[13] [1951] A.C. 367, 382.

[14] 1951 S.C. 712, 716, 717, 718.

Normand's judgment in *Paris* v. *Stepney Borough Council*[15] that the formula "does not detract from the test of the conduct and "judgment of the reasonable and prudent man." In *General Cleaning Contractors Ltd.* v. *Christmas*[16] my noble and learned friend Lord Tucker said: "It is true that in some cases there "may be precautions which are so obvious that no evidence is "required on the subject." In *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[17] Lord Cohen said that he agreed with Parker L.J. that "folly" was not to be read as "ridiculous" and did not think that that was the sense in which Lord Dunedin used it. I refrain from quoting observations in a similar sense from others of their Lordships in the cases cited. Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of omission or an act of commission. But where it is an act of omission that is alleged, I think it will be found, in the absence of evidence of practice, that the circumstances will rarely, if ever, lead judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can readily be understood and commends itself to common intelligence as something to be required. Lord Dunedin was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.

I think the appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend Lord Tucker and only wish to add some observations on the use of phrases or formulas as superseding in particular circumstances the normal formula of "reasonable care in all the circumstances."

While the doctrine of common employment was part of our law fine distinctions were drawn as to the circumstances in which an employer might be held liable notwithstanding that doctrine.

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[15] [1951] A.C. 367, 382.

[16] [1953] A.C. 180, 198; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

[17] [1956] A.C. 552, 578.

Now that common employment has been abolished those distinctions need no longer be drawn. I suggest, with all respect, that courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I have called the normal formula—that is, reasonable care in all the circumstances—is applied whatever the circumstances. Lord Dunedin's observation was, in its context, clearly only intended to apply where the practice proved was clearly proved and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which although the circumstances are not precisely similar evidence of practice should be given some though less weight. In any case, the formula seems to suggest, though this cannot have been intended, that if a plaintiff calls no evidence of practice he must establish folly in order to make out a prima facie case. In my view it would be unfortunate if courts had to consider what amounted to folly. I do not pretend to have considered every gloss on "reasonable care" which may from time to time have been cited as helpful, but speaking for myself I think the fewer the formulas the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another.

LORD JENKINS. I concur with the opinion of my noble and learned friend Lord Tucker, with which I am in complete agreement.

I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Neil Maclean & Co. for D. P. Marrinan, Belfast; Goldingham, Wellington & Co. for Henry J. Catchpole, Belfast.*

J. A. G.

J. C.*
1959
Dec. 16.

SAJAN SINGH . . . . . (Defendant) APPELLANT;

AND

SARDARA ALI . . . . (Plaintiff) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Contract—Illegality—Sale of goods—Sale of motor-lorry—Haulage permit necessary for use of lorry—Seller registered as owner—Object to deceive transport authorities—Lorry operated in unlawful manner

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* *Present*: LORD COHEN, LORD DENNING and LORD JENKINS.

—Seller subsequently removing lorry from buyer's possession—Claims for return of lorry or its value—Whether claim vitiated by deceit—Whether property in lorry passed to buyer—Road Transport Proclamation (Malaya) dated October 6, 1945*—Registration of Motor Vehicles Regulations (Malaya)*, 1945, *reg.* 2*—Motor Vehicles Commercial Use (Amendment) Regulations (Malaya)*, 1948, *reg.* 3.

Trespass—Goods, to—Possessory title—Obtained by illegal contract with defendant—Appropriation of goods by defendant—Whether trespass lies—Motor-vehicle.

Detinue—Plaintiff's property in goods—Obtained by illegal contract with defendant—Appropriation by defendant—Whether detinue lies—Motor-vehicle.

Road Traffic—Registration book—Not document of title—Property in vehicle obtained by illegal contract—Not registered—Whether property passes.

By regulations made by the Commissioner for Road Transport of Malaya pursuant to the powers conferred on him by the Road Transport Proclamation of October 6, 1945, no one could use or sell a motor-vehicle for the carriage of goods without a haulage permit. In 1948 the defendant bought six second-hand motor-vehicles from the British Military Disposals Board and the plaintiff paid the defendant $1,500 as a contribution towards the cost on the understanding that one of the vehicles, a Dodge motor-lorry, should become the property of the plaintiff. In 1950, the plaintiff and a friend of his paid a further $3,500 to the defendant, and the defendant executed a document of sale stating that he had sold the lorry jointly to the plaintiff and his friend. In 1953, the plaintiff purchased his friend's interest in the lorry.

Although the lorry was owned and operated by the plaintiff for the carriage of goods on his own account, the defendant registered the lorry in his own name, describing it as his lorry, and so obtained a haulage permit for it, authorising its use by himself or his employees. This deception on the public administration of Malaya was carried out in pursuance of an arrangement that had been made as part of the contract between the plaintiff and the defendant, and had as its object the acquisition of a permit in respect of the lorry; had the authorities not been deceived, a permit would not have been issued in respect of the lorry. The policy of the authorities at that time was to restrict the issue of permits to persons who had them before the war. The plaintiff did not fall within that category, whereas the defendant did.

In 1955, the defendant removed the lorry from the plaintiff's possession without his consent and refused to return it. On a claim by the plaintiff against the defendant for the return of the lorry or its value:—

Held, that notwithstanding that the contract for the sale of the lorry was unlawful, yet when in pursuance of the contract the lorry was sold and delivered to the plaintiff, the property in it passed to him; and thereby he derived the right to immediate possession of the lorry, which entitled him to sue the defendant in detinue. Further, the plaintiff had actual possession of the lorry at the time the defendant seized it and was entitled to sue in trespass. Accordingly, the plaintiff's claim succeeded.

Bowmakers Ltd. v. *Barnet Instruments Ltd.* [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579 approved.

Judgment of the Court of Appeal of the Federation of Malaya affirmed.

APPEAL (No. 19 of 1957) from a judgment of the Court of Appeal of the Federation of Malaya (Thomson C.J., Hill and Syed Sheh Barakbah JJ.) (March 15, 1957) reversing a judgment of the Supreme Court of the Federation of Malaya, Settlement of Malacca (Smith J.) (September 19, 1956), and awarding the plaintiff, Sardara Ali of 132, Lorong Panjang, Malacca, damages for trespass to a Dodge motor-lorry, registered number M 2207, the amount of such damages to be the value of the lorry as at the date of the trespass, January 27, 1955, and ordering the defendant, Sajan Singh of Bukit Asahan Estate, Malacca, to pay to the plaintiff the value of the lorry so calculated together with interest thereon at the rate of 6 per cent. per annum.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff was a lorry-driver. In 1948, he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of obtaining a haulage permit since he never had one before the war—it being the policy of the Road Transport Department at that time to grant haulage permits only to persons who had possessed them before the war. The defendant was a road haulier who had apparently had a haulage permit previously and had every chance of obtaining one. Accordingly, they came to an arrangement whereby the defendant was to acquire a second-hand lorry and to register it in his own name and to obtain a haulage permit for it in his own name, but all the time it was intended that it should belong to the plaintiff and be used by him on his own account.

The transaction was carried out in the following way: In December, 1948, the British Military Disposals Board were offering six second-hand motor-lorries for sale. The defendant bought them in his own name, but the plaintiff paid $1,500 towards the cost on the understanding that one of them should belong to him. This vehicle was a Dodge lorry numbered M 2207. It was registered in the name of the defendant and the haulage permit was issued in his name. On August 4, 1950, the plaintiff with a friend, Nihal Singh, paid another $3,500 to the defendant, and the defendant gave the plaintiff a document in the Punjabi language which, being translated, was as follows:

"I, Sajan Singh (Malacca), have sold a Dodge lorry No. "M 2207 to Nihal Singh and Sardara Ali jointly for $3,500. "Both of them can sell this lorry but can not sell the haulage "permit. The haulage permit is to be returned to Sajan Singh. "If anyone asks for the lorry after my death he can not get it. "Even if (anyone) takes it by force then (he or she) must pay "$3,500. If there is anything concerning the lorry then Nihal "Singh and Sardara Ali can represent Sajan Singh."

In 1953, Nihal Singh sold his share in the lorry to the plaintiff, who was thenceforward the sole person interested on the purchaser's side. He used the lorry as his own. He kept it at his own address, 132, Lorong Panjang, and used that address as his base of operations with it. He received the incomings, and according to his own story (which the trial judge in substance accepted) paid for the petrol and other outgoings. But as the lorry was registered in the name of the defendant, he did it all in the defendant's name. And since the defendant was liable for income tax, insurance, and so forth, the plaintiff delivered accounts to the defendant showing incomings and outgoings and the plaintiff paid to the defendant the amounts due for insurance, taxes, and so forth. In short, the lorry belonged to the plaintiff but was operated in the name of the defendant.

All this method of operation was quite illegal. Although the plaintiff used the vehicle as his own, it was registered in the name of the defendant, "Sajan Singh, Bukit Asahan Estate, Malacca." The haulage permit, too, was issued in the defendant's name. It was issued subject to the express condition that "the permit "holder shall use the vehicle from a base at Bukit Asahan "Estate, Malacca," and to the condition that "this permit is "personal to the permit holder. It may not be transferred or "assigned": and to the further condition that "the permit "holder shall not suffer or permit any authorised vehicle to be "driven by a person who is not a bona fide employee of the "permit holder." It was, therefore, quite illegal for the defendant to permit the plaintiff to use it at all on his own account. The two of them were, as the trial judge said, fellow conspirators engaged in practising a deceit on the public administration of the country. For aught that appeared, both of them were equally guilty.

In 1954, the plaintiff and the defendant fell out. The defendant said that the lorry belonged to him and that the plaintiff was only a driver employed by him. The plaintiff said that it was his, and he applied to the Commissioner for Road Transport for a haulage permit in his own name. His solicitors, on December 29, 1954, wrote to the Commissioner for Road Transport and said: " . . . what we are asking for is the removal of the present permit " holder and the reissue of the permit in our client's own name." In the afternoon of January 26, or January 27, 1955, while the plaintiff was absent from his home, the defendant came and took the lorry away. He has always since refused to return it, claiming that it belongs to him.

In June, 1955, the Commissioner for Road Transport refused to grant a haulage permit to the plaintiff. The refusal was in some way connected with government policy about the entry of Malays into the road transport industry. Undeterred by this refusal, the plaintiff continued to claim the lorry. In November, 1955, he brought the present proceedings against the defendant. In his statement of claim he relied on the document of sale of August 4, 1950, and set it out in full. He said that he had paid the defendant $5,000. He further alleged that the vehicle was in his possession until January 27, 1955, when the defendant took it away and had since refused to return it. By his prayer he asked: (i) for a declaration that the plaintiff is the owner of the authorised vehicle; (ii) for the return of the Dodge motor-lorry No. M 2207 as an authorised vehicle, together with the use of the haulage permit; (iii) in the alternative, damages for detinue $5,000; (iv) damages at $400 per month for loss of earnings or profit from January 27, 1955.

The defendant, in his defence, claimed that the lorry belonged to him, and that the plaintiff was employed by him as a driver. He denied having signed the document of sale dated August 4, 1950.

1959. Oct. 26. *Ralph Millner* for the defendant. The plaintiff's claim is based on an illegal transaction, and therefore the court ought to reject it on the principle of ex turpi causa non oritur actio. In a sense, there is a wider principle, which is referred to in Spencer Bower on Estoppel by Representation (1923), p. 383, as follows: " it is perhaps proper to take some " notice of the rule of conduct which the judiciary has adopted " for its own guidance, and in the public interest, that any party " litigant shall not be allowed, either in support of his own claim, " or in answer to that of his opponent, to set up his own fraud, " illegality, or wrong—nemo allegans suam turpitudinem est " audiendus—a rule which is of kin to, but of wider scope than, "the rule, ex turpi causa non oritur actio." This rule was adverted to by Eyre C.B. in *Gibson* v. *Minet*[1] when he said: "I am ready to admit that beyond the strict legal estoppels by "deed and in pais, we have received into the law of England a "sort of moral estoppel. We say, no man shall be heard to "allege his own crime or turpitude in his defence." The plaintiff, to prove his case, had to show that he practised jointly with the defendant a deceit on the public administration of Malaya. Without the deceit induced by the defendant pretending that he was the owner of the motor-vehicle, no haulage permit would have been issued in respect of the vehicle, and it would have been an unauthorised goods vehicle within the meaning of the regulations. The parties to this contract carried out an agreement which infringed the regulations as to user of goods vehicles and as to the sale and possession of goods vehicles, because by regulation 2 of the Motor Vehicles Regulations of October, 1945, it was illegal to sell or part with the possession of a vehicle without a haulage permit. Further, haulage permits were personal to the person to whom they were issued and could not be assigned. So that this agreement involved a breach of the conditions upon which the permit was granted—in itself an offence. The agreement embodied an arrangement to evade the control of the regulations and was no less than a criminal conspiracy to violate them. The arrangement pleaded and proved, whatever its nature, was an illegal transaction having regard to the regulations, and it is a cardinal principle that the court will not enforce an illegal transaction.

Where an agreement has as its object the defrauding or deception of public authorities, it is an unlawful contract which will not be enforceable: see *Alexander* v. *Rayson*.[2] Although the relief claimed in the present case is in detinue, the plaintiff to obtain his relief has to rely upon the unlawful contract. The present case is analogous to that of *Taylor* v. *Chester*,[3] where there was a pledge of a banknote for an illegal purpose. To overcome the defence raised at the trial in the present case that the motor-vehicle belonged to the defendant, the plaintiff had to set up and prove the illegal bargain that he had made with the defendant for the sale of the vehicle. Once his case involves the disclosure of an illegality his claim must fail.

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[1] (1791) 1 Hy.Bl. 569, 611.

[2] [1936] 1 K.B. 169; 52 T.L.R. 131.

[3] (1869) L.R. 4 Q.B. 309.

The principal authority relied upon by the Court of Appeal for reversing the trial judge was *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[4] but that case is clearly distinguishable because it did not involve the setting up of an illegal bargain; the basis of that case was the concession by the defendants that the property in the goods had passed to the plaintiffs. But here the ownership of the lorry was the fundamental fact which the plaintiff had to prove. The defendant did not concede any right in the plaintiff to the lorry; the case is quite different from the *Bowmaker* case,[4] where it was conceded that the plaintiff had derived a good title to the goods from third parties. The plaintiff here had to prove that he acquired the lorry from the defendant, and to establish that fact he had to plead an illegality.

In an illegal transaction a defendant in possession is in the better position. In the present case the defendant could not have claimed the lorry by action, because the plaintiff could set up the illegal transaction and the court would not intervene to assist either party. But if, as here, he recovers it by force, he is able to keep the lorry, because he is in possession and the plaintiff cannot succeed without disclosing an illegality. This is not really a hard case, because the merits and demerits as between the two parties to an illegal contract are the same.

The contract was illegal and void, and therefore it could have no consequences in law and no property could pass to the plaintiff. That the plaintiff here was really relying on the unlawful contract can be seen from *Delaney* v. *T. P. Smith Ltd.*[5] It has been suggested in three cases that, even where a sale is unlawful, property in the subject-matter of the sale can pass; but close analysis of those cases shows that such a suggestion was never a part of the decision in any of those cases. In any event all the cases relied upon for this suggestion are distinguishable from the present case. In *Simpson* v. *Nicholls*[6] all that the court decided was a pleading point. In his judgment Parke B. referred to *Williams* v. *Paul*,[7] where the defendant bought a heifer on a Sunday and was held liable on a quantum meruit because he kept the goods after Sunday and expressly made a new promise to pay for them subsequent to Sunday. On that basis the contract sued upon was not illegal as not being in breach of the statutory prohibition of Sunday trading. Moreover, the sale of goods on a

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[4] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

[5] [1946] K.B. 393; 62 T.L.R. 398; [1946] 2 All E.R. 23.

[6] (1838) 3 M. & W. 240.

[7] (1830) 6 Bing. 653.

Sunday has always been treated in a special way, and observations in cases of Sunday trading cannot be of general application. For these reasons, the remarks of Parke B. in *Simpson* v. *Nicholls* [8] that the property in the goods passed though the contract was unlawful are not of assistance. *Scarfe* v. *Morgan* [9] also concerned Sunday trading, but it was decided that the contract there in question was not illegal, and therefore the observation of Parke B.[10] that, if an illegal contract was executed, the property in the subject-matter of the contract passed is obiter. In *Feret* v. *Hill* [11] the contract was not illegal—the illegality, if any, was subsequent to the contract, and therefore at the date of the contract the property could pass. The lease there was voidable, not void; here the contract was illegal and void, and therefore *Feret* v. *Hill* [11] is distinguishable.

If an agreement is illegal, it is void, and therefore property in the subject-matter of the contract cannot pass. So in the present case the plaintiff could not acquire title to the lorry; the contract for its sale was void and could not have effect. In none of the cases that were relied on in the Court of Appeal was the contract illegal. A void contract is one that never existed. To prove that the lorry was his property the plaintiff has to rely on the contract of sale—that is the only way he can do so. Ownership was in issue, and the court has to look at the substance of the matter, not at the way the claim is formulated: see *Delaney* v. *T. P. Smith Ltd.*[12] If the purpose of an agreement involves the deliberate commission of offences, the court will not lend its assistance to either party. To allow the plaintiff's claim here is to enforce an illegal contract.

The plaintiff did not appear and was not represented.

December 16. The judgment of their Lordships was delivered by LORD DENNING. The plaintiff, Sardara Ali, is a lorry-driver living at No. 132, Lorong Panjang, Malacca. The defendant, Sajan Singh, is a haulier living at Bukit Asahan Estate, Malacca. The two of them entered into an illegal transaction about a lorry. They broke the regulations which governed the transfer and use of motor-vehicles. The question is what are their rights consequent on this illegality.

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[8] 3 M. & W. 240, 244.

[9] (1838) 4 M. & W. 270.

[10] Ibid. 281.

[11] (1854) 15 C.B. 207.

[12] [1946] K.B. 393.

The regulations in question were made soon after the war by the Commissioner for Road Transport under the powers conferred on him by the Road Transport Proclamation, dated October 6, 1945: and they were affirmed and continued afterwards by the Road Transport (Amendment) Ordinance, 1949. They fell into two groups:

(i) The regulations which required vehicles to be *registered* with the Registrar of Motor Vehicles: under these regulations any person who had a motor-vehicle had to register it and give particulars of his title to it. And it was provided that no person should "sell, exchange, part with the possession of, purchase, "acquire or take possession of any motor vehicle without a permit "in writing from the Registrar." See regulation 2 of the Registration of Motor Vehicles Regulations, dated October 10, 1945.

(ii) The regulations which controlled the *use* of vehicles for the carriage of goods. Under these regulations it was provided that no person should "use a goods vehicle or cause suffer or permit a "goods vehicle to be used for the carriage of goods" unless it was an *authorised vehicle*, that is to say, unless there was a haulage permit authorising it to be so used. The regulations said that a vehicle "shall not be deemed to be an authorised vehicle unless "it is used by the holder of a permit in accordance with the "conditions of such permit." See regulation 3 of the Motor Vehicles Commercial Use (Amendment) Regulations, 1948.

For some years after the war it was very difficult for a newcomer to get a haulage permit. The policy of the Road Transport Department at that time was to grant haulage permits only to those persons to whom they had been granted before the war.

[His Lordship then stated the facts as set out above and continued:] At the trial the principal issue was whether the document of sale was a forgery or not. A handwriting expert was called. The judge (Smith J.) held that the document was genuine. He said he was satisfied of the truth of the plaintiff's claim. But he drew attention to the illegality of the transaction. No question of illegality appeared on the pleadings, but in the course of the trial counsel for both parties agreed that the Registrar and Inspector of Motor Vehicles was deceived during the period of the British Military Administration. When the judge came to give judgment, he took notice of this illegality and held that there was a "moral "estoppel" which prevented the plaintiff from recovering. It was the duty of the court, he said, when it realised that a litigant was setting up his own fraud, to refuse him aid. "The principle," he said, "is 'Ex turpi causa non oritur actio' . . . The plaintiff "on his own showing was party to a deceit whereby the Registrar "of Motor Vehicles issued a haulage permit for lorry M 2207 "which he would not have done if he had not been deceived."

The Court of Appeal reversed this decision. Thomson C.J. (with whom Syed Sheh Barakbah J. agreed) said that "The "action was not in contract. It was an action for trespass to "goods." They held that the plaintiff could recover damages for trespass and that the amount should be the value of the lorry at the time of the trespass, that is to say, in January, 1955, but no damages for loss of profits. Hill J. would have gone further and given the plaintiff the declaration he sought, and ordered the defendant to return the lorry or pay the value at the time of seizure.

It is not, perhaps, strictly accurate to say that the action was laid in trespass. It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the plaintiff to show that he was the owner of the lorry, and that it was an authorised vehicle. In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it; see Bullen & Leake, 3rd ed. (1868), p. 312.[1] And in detinue their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin: see *Scarfe* v. *Morgan*,[2] *per* Parke B. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it—he cannot throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality—it has no power to do so—so it says, in the words of Lord Eldon: "Let the "estate lie where it falls"; see *Muckleston* v. *Brown*.[3] This principle was applied by the Court of Appeal recently in *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[4] The parties to the fraud are, of course, liable to be punished for the part they played in the illegal transaction, but nevertheless the property passes to the transferee.

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[1] 11th ed. (1959), p. 425.

[2] (1838) 4 M. & W. 270, 281.

Their Lordships do not overlook the fact that the defendant remained registered as the owner of the lorry and that no permission was given for the sale: but this did not prevent the property in it passing to the plaintiff. The registration book is not in Malaya, any more than it is in England, a document of title. The title passed by the sale and delivery of the lorry to the plaintiff. The absence of registration would no doubt put the plaintiff in difficulty if he had to prove his title, but it would not invalidate it: see *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.*[5]

In this case, on the facts pleaded and the findings of the trial judge, the plaintiff had a clear cause of action. He had actual possession of the lorry at the moment when the defendant seized it. Despite the illegality of the contract, the property had passed to him by the sale and delivery of the lorry: compare *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[6] referred to above. When he commenced this action, he had the right to immediate possession. Their Lordships think that in these circumstances he had a claim in detinue. But he had also, as the Court of Appeal has found, a clear claim in trespass. Trespass was not in terms pleaded, but the facts were pleaded. And on the facts the plaintiff was entitled to rely on his possession. The Court of Appeal did not actually direct amendment of the pleadings, but it is clear from their judgment that, had they been asked to do so, they could have done so. Their Lordships think that, on the facts pleaded, they were fully justified in reversing the decision of the trial judge.

The plaintiff would have been entitled to an order for the return of the vehicle or its value. As it had not been returned, he was clearly entitled to its value. That is the order made by the Court of Appeal and their Lordships agree with it.

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[3] (1801) 6 Ves. 52, 69.

[4] [1945] K.B. 65, 70; 61 T.L.R. 62; [1944] 2 All E.R. 579.

[5] [1949] 1 K.B. 322, 338; 65 T.L.R. 66; [1949] 1 All E.R. 37.

[6] [1945] K.B. 65.

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Their Lordships would only add this: if the law were not to allow the plaintiff to recover in this case, it would leave the defendant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the facts of the present case, this is not the law.

Their Lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed.

Solicitors: *Hy. S. L. Polak & Co.*

N. P.

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OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH HOR KHOON AND OTHERS, BANKRUPTS . . . . . . APPELLANT;

AND

EK LIONG HIN LTD. . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Moneylender—Definition—Exclusion from—Loans "in the course" and "for the purposes" of business not having for its primary object the lending of money—Moneylenders Ordinance (Laws of the Colony of Singapore, 1955 *Ed.*, c. 193), *s.* 2 (*d*)—*Moneylenders Act*, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 6 (*d*).
Singapore—Moneylender.

By section 2 of the Moneylenders Ordinance, c. 193 of the 1955 edition of the Laws of Singapore: "'Moneylender' shall include "every person whose business is that of moneylending, . . . but "shall not include . . . (*d*) any person . . . bona fide carrying on "any business not having for its primary object the lending of "money, in the course of which and for the purposes whereof he "lends money." (Section 2 (*d*) of the Singapore Ordinance is identical with section 6 (*d*) of the English Moneylenders Act, 1900.)

The respondent company, incorporated in Singapore, owned a rubber estate and ships, and carried on as their primary business that of rubber merchants and shippers. They also had a godown storage department and made loans to selected customers on the security of goods stored in the godowns, such loans being made, according to the evidence, in order to retain their existing customers and to gain fresh ones; they did not advertise the fact that they were willing to lend money. Shortly after loans had been made by the respondents to a firm on the security of goods stored in the godowns the firm encountered financial difficulties and the respondents sold the goods and credited the money from the sale against the loans. Thereafter a receiving order was made against the firm and its members were adjudicated bankrupts, and the appellant, as official assignee of the bankrupts' property, alleging that the respondents were moneylenders within the meaning of the Moneylenders Ordinance, claimed from them the return of the goods or their value on the ground that, admittedly, they had not, when dealing with the firm, complied with the formalities required by the Ordinance:—

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* *Present*: Lord Denning, Lord Jenkins, the Rt. Hon. L. M. D. de Silva.

Held, that the moneylending transactions were undertaken in the course of the previous business and as part of its activities as a whole, and being undertaken, necessarily, in the respondents' view, to retain existing customers and to gain fresh ones, and thus to preserve and advance the business previously done, were carried on for the purposes of the business. The loans were thus made "in "the course" and "for the purposes" of the respondents' business as a whole, and they were not therefore moneylenders within the meaning of the Ordinance, and the appellant's claim failed.

"Whereof" in section 2 (*d*) of the Ordinance refers to the business and not to the primary objects of the business; it is sufficient that the moneylending transactions are undertaken genuinely for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business, and not necessarily in connection with its primary objects.

Furber v. *Fieldings Ltd.* (1907) 23 T.L.R. 362 approved.

Edgelow v. *MacElwee* [1918] 1 K.B. 205 considered.

Judgment of the Court of Appeal of the Colony of Singapore affirmed.

APPEAL (No. 8 of 1959) from a judgment of the Court of Appeal of Singapore (January 13, 1958) reversing a judgment of the High Court of Singapore (Knight J.) (July 5, 1957).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant, who was the plaintiff in this case, was the official assignee of the property of four persons who had been adjudicated bankrupt on February 27, 1953, and who, before that date, had been trading together under the name of Koh Bian Seng. The firm had borrowed certain sums of money from the defendant company (respondents to this appeal) on the security of a quantity of galvanised iron sheets placed in its possession. In this action instituted in the High Court of Singapore the appellant asked for the return to him by the respondents of the iron sheets or their value, and for certain other relief on the ground that the respondents were moneylenders within the meaning of that term in the Moneylenders Ordinance of Singapore (cap. 193, Laws of the Colony of Singapore, 1955 Edition), that they had failed when dealing with Koh Bian Seng to comply with the formalities required by section 5 of the Ordinance and that, consequently, the security taken could not be enforced.

Section 5 of the Ordinance was to the following effect: "5.—(1) No contract for the repayment by a borrower or his "agent of money lent to him or to any agent on his behalf by a "moneylender or his agent on or after the first day of January, "1936, or for the payment by him of interest on money so lent, "and no security given by the borrower or by any such agent as "aforesaid in respect of any such contract, shall be enforceable, "unless a note or memorandum in writing of the contract in the "English language be signed by the parties to the contract or "their respective agents, or, in the case of a loan to a partnership "firm, by a partner in or agent of the firm, and unless a copy "thereof authenticated by the lender or his agent be delivered to "the borrower or his agent, or, in the case of a loan to a partnership firm, to a partner in or agent of the firm, before the money "is lent; and no such contract or security shall be enforceable, if "it is proved that the note or memorandum aforesaid was not so "signed before the money was lent or before the security was "given, as the case may be: . . ."

There was a proviso to that subsection and three subsections, (2), (4) and (5), which had no bearing on the matter under consideration in this case.

Subsection (3) read: "(3) The note or memorandum aforesaid "shall contain all the terms of the contract, and in particular "shall show separately and distinctly—(*a*) the date of the loan; "(*b*) the principal; and (*c*) the rate of interest per centum per "annum payable in respect of such loan or, where the interest is "not expressed in terms of a rate per centum per annum, the "amount of such interest."

The respondents admitted that the formalities required by the section were not observed but denied that they were moneylenders. The High Court of Singapore (Knight J.) held that they were. On appeal, the Court of Appeal (Whyatt C.J., Tan Ah Tah and Chua JJ.) held that they were not. This was an appeal from that decision.

Under section 2 of the Moneylenders Ordinance of Singapore "moneylender" was defined thus: " 'moneylender' shall include "every person whose business is that of moneylending, or who "carries on or advertises or announces himself or holds himself "out in any way as carrying on that business, whether or not "that person also possesses or earns property or money derived "from sources other than the lending of money, and whether or "not that person carries on the business as a principal or as an "agent; but shall not include . . ." then followed certain exceptions (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), of which the only one relevant on the facts of this case to the question to be decided was "(*d*) any "person bona fide carrying on the business of banking or insur-"ance, or bona fide carrying on any business not having for its "primary object the lending of money, in the course of which "and for the purposes whereof he lends money; . . ."

The definition was the same as that to be found in section 6 of the English Act of 1900 except that the words "whether or not "that person also possesses or earns property or money derived "from sources other than the lending of money" did not appear in the English Act. The Singapore Ordinance also contained (section 3) the following provision not to be found in the English Act: "3. Save as excepted in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) "and (*f*) of the definition of 'moneylender' in section 2, any "person who lends money at interest or who lends a sum of "money in consideration of a larger sum being repaid shall be "presumed, until the contrary be proved, to be a moneylender."

The respondents admitted that they carried on the business of moneylending but claimed that they were not moneylenders within the meaning of the Ordinance on the ground that they were a "person," who, in the language of section 2 (*d*) (see above), carried on "a business not having for its primary object the "lending of money, in the course of which and for the purposes "whereof he lends money."

It was found by the trial judge that "there is no suggestion "that the defendant company's primary object is moneylending—"in fact they are rubber merchants and shippers—and the only "question for determination is whether these loans were made "'in the course of their business and for its purposes'."

It was upon that question that the courts in Singapore had disagreed and it was the only question for decision on this appeal. It was common ground that if the respondents were held as a result of the answer to the question to be moneylenders this appeal should be allowed, and that if they were held not to be moneylenders the appeal should be dismissed.

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The respondents were a limited company incorporated in Singapore in 1948 with a nominal capital of 2,000,000 dollars and assets approximately of the value of 10,000,000 dollars. Their primary business, as found by the trial judge, was that of "rubber "merchants and shippers." They had a rubber estate and ships that plied between Singapore and Indonesia. In 1951 they started a godown storage department as a facility for their customers, and in the same year they also started as an additional facility to make loans on the security of the goods stored in their godowns. The audited figures in the balance-sheet "at Decem-"ber 31, 1952," showed that out of their total assets of about 10,000,000 dollars about 1,000,000 was out on loan. They made loans only to selected customers who stored goods with them. They did not advertise the fact that they were willing to lend money.

1959. Nov. 9, 10. *Eustace Roskill Q.C.* and *Basil Eckersley* for the appellant. The case for the appellant, shortly, is that the irresistible inference from the evidence is that the respondents were carrying on a moneylending business and were using the godowns to store goods which were pledged as security for money lent. Under the Moneylenders Ordinance the burden of proving that they were not moneylenders within the meaning of section 2 of the Ordinance is wholly on the respondents, and when one looks at the evidence on the sort of business they carried on, they have not discharged that burden. There is no provision in the Ordinance comparable with the registration provision of the English Moneylenders Act of 1900. It was admitted by the respondents that these transactions did not comply with the provisions of the Ordinance, and they said that there was no reason why they should—that has always been their case. Looking at the two contracts of loan in this case the ordinary plain inference, in the absence of evidence to the contrary, is that they were ordinary loan transactions secured by the pledge of the goods, and it cannot be contended that the loans made were incidental to or for the purposes of the respondents' primary business of rubber merchants and shippers. There is no evidence that any of these goods came from one of the respondents' ships, and nothing to connect the goods with any other part of the respondents' business. This was not, it is submitted, really a genuine storage business at all; they made the money out of interest. The length of the period over which some of the loans were made and other factors were quite inconsistent with the loans being

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ancillary to the warehouse business. They were not short-term loans with repayment against sales; the broad pattern is consistent only with the true nature of these transactions being pure moneylending transactions.

There is no evidence that the respondents' shipping or rubber business was in the least affected by granting these loans. There has to be some sort of causal connection—a link between the primary business and the loans—and there is no evidence here of that. The godown business must be treated either as part of their total business or as a separate business. If treated as part of their total business, there is not a shred of evidence that the loans were made for the purposes of or in the course of or incidental to the rubber and shipping business at all. The appellant's position is equally strong if the godown business is treated as a separate business. In the judgment of the Court of Appeal in this case it was said that the wording of section 2 (*d*) of the Ordinance " is almost startling in its simplicity and I cannot help " thinking that if Lord Macnaghten had had to consider it, he " would have said of it, as he said of other provisions of the " Moneylenders Act, 1900, when giving judgment in *Samuel* v. " *Newbold*,[1] that any man of common sense was just as capable " of deciding the question which it raises as the most learned " judge in the land, provided he is not hampered by authorities. " . . ." That passage is completely inaccurate; it was not said by Lord Macnaghten in relation to any moneylending case at all: see *Samuel* v. *Newbold*.[2] In *Edgelow* v. *MacElwee* [3] McCardie J. said that no system of loans would fall within section 6 (*d*) of the Moneylenders Act of 1900—which is in the same terms as section 2 (*d*) of the Singapore Ordinance—" unless such loans are " in substance and actuality directly incidental to the business " which is the primary object and pursuit of the person who " makes the loans." That was not so in the present case. The Court of Appeal below added that a more helpful dictum than that of McCardie J., " because it is more general in its application, is the dictum of Farwell J. in *Litchfield* v. *Dreyfus* [4]," where he said that " the Act was intended to apply only to " persons who are really carrying on the business of moneylending " as a business, not to persons who lend money as an incident " of another business." That dictum, said the Court of Appeal judgment, was approved by Ridley J. in *Newman* v. *Oughton*,[5] who also said: "I think that Lord Loreburn L.C. when discussing "in *Kirkwood* v. *Gadd*[6] the meaning of carrying on business, "intended to adopt the language of Farwell J." in *Litchfield* v. *Dreyfus*.[7] There is, however, no reference to *Litchfield* v. *Dreyfus* in *Kirkwood* v. *Gadd*.[8]

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[1] [1906] A.C. 461; 22 T.L.R. 703.

[2] [1906] A.C. 461, 469.

[3] [1918] 1 K.B. 205, 207.

[4] [1906] 1 K.B. 584, 590; 22 T.L.R. 385.

Furber v. *Fieldings* (*Ltd.*)[9] was a decision on its own facts —the loan was held to be merely incidental—and in effect it followed *Litchfield* v. *Dreyfus*.[10] The English cases say that one only gets within the exception if the moneylending is incidental to the main business carried on: *Newton* v. *Pyke*.[11] The respondents here have to show that they are carrying on a business which is not itself a moneylending business and that the loans were made for the purposes of and in the course of that non-moneylending business. Having used the godowns for the purposes of lodging goods as security for the loans, they cannot then say that the loans per se were made for the purposes of the shipping and rubber business. If they are running two businesses —the shipping and rubber business and a moneylending business —then they are not within the protection of the exception—they never get within (*d*) at all. These loans were not made in the course of and for the purposes of the primary business of shipping and rubber; the Court of Appeal were in error in saying that "the business of the godown department, taken by itself, was "primarily a business of providing storage space, and was not "a mere cover for a moneylending business."

If, as here, the moneylending reaches the status of an independent business standing on its own feet and is something quite distinct from the primary business, then it cannot be said to be in the course of and for the purposes of that business. "In the "course of" the business requires direct and intimate relationship with the normal course of the primary business. The test is, can the transaction in question be said fairly to be an ordinary incident of the primary business or is it indicative of the existence of a distinct and separate activity—the business of moneylending? If that be right, then plainly the test is an objective one. "Pur-"poses" are purposes directly associated with the furtherance of the objective or objectives of the primary business, the test being whether the transaction is really directed to the fulfilment of the primary objective of the business of the lender or to the obtaining of the rewards of a moneylending transaction. In applying that test in any given case the court has to examine the facts objectively. The fact that a party may have intended the loans to further his other business, or even the inference that that objective may to a greater or lesser extent be achieved, is irrelevant if in the result there emerges from that objective examination a business with the status of a separate business of moneylending. *In re South African Supply and Cold Storage Co.*[12] is of some slight assistance on the meaning of "purpose." "For the purposes of" is something more affirmative than "in "the course of." *Edgelow* v. *MacElwee*[13] has stood for over 40 years and the appellant here is entitled to rely on it.

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[5] [1911] 1 K.B. 792, 794; 27 T.L.R. 254.

[6] [1910] A.C. 422; 26 T.L.R. 530.

[7] [1906] 1 K.B. 584.

[8] [1910] A.C. 422.

[9] (1907) 23 T.L.R. 362.

[10] [1906] 1 K.B. 584.

[11] (1908) 25 T.L.R. 127.

The Court of Appeal in the present case, it is submitted, misconstrued the section and then misapplied the facts to the misconstrued section. There is no evidence that anybody who received a loan ever shipped any goods on the respondents' ships or bought any rubber from their rubber estate, or ever pledged as security for a loan from the respondents any goods purchased from the respondents or shipped on their ships. On the other hand, there is the unchallenged and unchallengeable fact that the total gain from the so-called genuine business of warehousing was very small when compared with that resulting from loan transactions.

C. P. Harvey Q.C. and *I. Starforth Hill* for the respondents. It is admitted that the respondents were engaged to a substantial degree in moneylending and that they come within the first part of the definition of "moneylender." There is no magic or legal significance to be attached to the word "moneylending"—it simply means lending money. Any person who ever makes a loan is presumed to be a person who carries on the business of making loans; it is an onus which can very easily be disposed of. What emerges when there is no definition of "moneylending" but there is one of "moneylender" is that every loan, big or small, which one makes, being a moneylender, is caught by this Ordinance. If a moneylender lends his brother £1,000 to buy a house, it is caught by this Ordinance; per contra, if one is not a moneylender, one can lend as much money as one likes. The number of transactions carried on by the respondents in this case is quite irrelevant.

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[12] [1904] 2 Ch. 268.

[13] [1918] 1 K.B. 205.

In *Edgelow* v. *MacElwee* [13] McCardie J. found that the solicitor there really was not carrying on a solicitor's business at all; that decision was plainly right on any construction, though McCardie J. may have gone further than was necessary for the case. If the definition of McCardie J. of the effect of the corresponding words of the English Act is to be taken as applying equally to the Ordinance, this Board should not adopt his view where he said that the loans would not fall within the exception "unless the loans were, in substance and actuality, directly "incidental to the business which is the primary object and "pursuit of the person who makes the loans." It is sufficient if the loans are made in the course of and for the purposes of the business as a whole, and not merely of its primary objects.

The objective test is wrong. The man who is running the business must surely be he who must be trusted to decide what is the right course of business. Who is the judge to say otherwise? One can only give a right, proper and workable meaning to exception (*d*) by approaching it on the subjective and not the objective line. Further, this being an essentially penal statute, it is wrong to interpret it in an objective way. Whether the test is subjective or objective is really the whole point which lies between us; and it should be noted in this connection that the Ordinance operates on moneylenders and not on moneylending—it operates in personam rather than in rem. The limits of the moneylending man are determined by the limits of his bona fides; the opinion of the judge can be given when he finds himself, as McCardie J. did, able to say "I do not believe in the bona fides "of this business at all." This point as to bona fides is tied up a little with the question whether the godown department was a separate department from the rest of the business, and that is a point which in the circumstances should not now be allowed to be taken; no one has investigated that as a matter of fact: *Archambault* v. *Archambault*.[14] Further, when, as here, the evidence shows that it is a normal commercial practice in Singapore to carry on business in this way, that does bear strongly on the question of bona fides, and it also follows from that that the loans were made "for the purposes of" the respondents' business as a whole. It would be quite wrong for this Board to take into consideration the theory that the godown business is to be regarded as a separate business. It is conceded that, so far as is known, this was certainly a transaction where the bankrupts were not proposing to ship their goods on the respondents' ships.

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[13] [1918] 1 K.B. 205.

[14] [1902] A.C. 575, 582.

Furber v. *Fieldings (Ltd.)*[15] was rightly decided; it is perhaps a marginal case; it is specifically one in which the subjective view was accepted. The Court of Appeal were absolutely right when they said: "Where, as in the present instance, the business "is a complex one and comprises not one 'primary object and "'pursuit' but several objects, namely, shipping, warehousing, "rubber dealing and rubber growing, it is plain that the dictum "of McCardie J. cannot, from the nature of the case, be applied "without modification." What Farwell J. said in *Litchfield* v. *Dreyfus*[16] is accepted; it is much more guarded than what McCardie J. said, though it would not appear that Farwell J. was trying to give a precise meaning to the words "in the course "of which and for the purposes whereof he lends money," and consequently that particular dictum does not assist one way or the other. The respondents were at the material time bona fide carrying on a business not having for its primary object the lending of money, and they made the loans in question in the course of that business and for its purposes.

Eustace Roskill Q.C. in reply. The onus is on the respondents, and on the sum total of the evidence they have not discharged it. The point whether the godown department was a separate business was considered in the court below; this case is not like *Archambault's* case.[17] The objective and not the subjective test applies. As to this being a penal statute, see *Temperance Loan Fund Ltd.* v. *Rose*.[18] There is no evidence of any other person's godown business lending money.

1960. Jan. 14. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: It does not appear to what extent the moneys raised were utilised by the borrowers in connection with the other branches of the respondents' business, and it is assumed for the purposes of this judgment that a large part of it was not so used.

The trial judge opened his judgment with the words "The "facts in this case are not in dispute." No question of credibility arose in this case and the lowest at which the case for the respondents on the facts can be viewed is that the witnesses called by them believed what they said even if it can be suggested that they were mistaken in certain inferences of fact which they made.

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[15] 23 T.L.R. 362.

[16] [1906] 1 K.B. 584.

[17] [1902] A.C. 575.

[18] [1932] 2 K.B. 522, 533.

On the question whether the respondents "lent money (*a*) in "the course of their business and (*b*) for the purposes of their "business" Whyatt C.J., who wrote the principal judgment of the Court of Appeal, said: "As regards (*a*), it is clear from the "evidence that these loans were made in accordance with the "normal commercial practice of shipping and godown companies "in Singapore and therefore it follows, in my view, that they "were made in the course of the appellants' business. As regards "(*b*), the evidence shows that the purpose of these loan transactions was to prevent the appellants losing customers to their "competitors and it cannot, in my view, be said that money lent "for such a purpose was not lent for the purposes of the appellants' business. As the appellants' godown manager put it: "'If we did not allow certain customers loans against their goods, "'we would lose a lot of them. Several of our customers who "'use our godown storage also use our ships'."

Their Lordships agree with the conclusions arrived at by the Court of Appeal. It was said for the appellant that the evidence did not warrant a finding that there was "a normal commercial "practice" as found. There was evidence that "several other "firms do this sort of business which is a useful facility for "members of the business community." So that, even if the practice was not "normal" in the strict sense of the word, it was not infrequent. The moneylending transactions could not properly be regarded as a separate business and, as observed by the Chief Justice, it was never suggested in the course of the argument before the Court of Appeal that it was. They were undertaken in the course of the previous business and as a part of its activities as a whole. It also appears from the evidence that they were undertaken by offering facilities to retain the existing customers and to gain fresh ones, and thus to preserve and advance the business previously done. They can therefore legitimately be said to have been undertaken and carried on for the purposes thereof.

Upon the question discussed in the preceding paragraph the trial judge said: "The evidence on this point is very slight. "The manager of defendant company's godown department "stated that unless they allowed these facilities to persons who "stored their goods in the company's godowns, these customers "would go elsewhere. This, of course, might result in a loss "to the company's godown business though I do not see how its "primary objects, i.e., rubber trading and shipping, would be "affected. It is true the witness inferred that if customers left "the company's godowns they might cease to use the company's "ships—but there is no concrete evidence in this regard what-"soever and mere inference, as I see it, is wholly insufficient."

It will be seen that the trial judge was of the opinion that there was not sufficient material upon which he could accept the correctness of the view which, as a matter of business judgment, was held by the company, that if the moneylending transactions had not been undertaken some of the customers might have ceased to do business with the company in spheres (other than that of moneylending) such as shipping. In their Lordships' opinion the correctness of the view held by the company is immaterial to their case. The important thing is that it was genuinely held. If it was, then the moneylending transactions were carried out with the object of preserving and advancing the business and therefore for the purposes of the business. The trial judge refused to accept the correctness of the view held by the company but he did not hold, and the whole tenor of his judgment indicates that he would not have held, that the view was not genuinely held. Even if the view was incorrect, in the words of the Court of Appeal, "the evidence shows that the purpose of "these loan transactions was to prevent the respondents [appel-"lants in the Court of Appeal] losing customers to their "competitors" and therefore they were undertaken for the purposes of the business. It would be most unsafe to hold that a business view such as the one mentioned was in fact incorrect without very much more investigation than has taken place. And, as already stated, correctness was immaterial so long as it was genuinely held.

The trial judge seemed to have thought that the words "for "the purposes whereof he lends money" indicate that the money lent must be shown to have been lent for the purposes of the primary objects of the business. Their Lordships do not think this is the true construction of the subsection. "Whereof" refers to the business and not to the primary objects. It is sufficient in their opinion that the moneylending transactions are undertaken genuinely for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business and not necessarily in connection with its primary objects.

Their Lordships would observe that the decision of Phillimore J. in *Furber* v. *Fieldings (Ltd.)*[1] has followed the same general line of reasoning as their own. In that case the question arose whether the plaintiff was a moneylender within the meaning of the Moneylenders Act, 1900. If he had been, his claim would have failed. He carried on the business of a surveyor, valuer and auctioneer and also lent money. It was argued for him that by reason of the provision in section 6 (*d*) of that Act (identical with section 2 (*d*) of the Singapore Ordinance) he was not a moneylender. It appeared from the evidence that[2] "Substantially any person who asked them for a loan on the security "of chattels would receive that loan if the security were sufficient "unless there was some personal objection to the applicant," and that[3] "Their [the plaintiff's firm's] object in advancing money "upon bills of sale was that by that means they obtained a "valuation fee, in the first instance, and the business also "brought them in touch with a class of persons from whom they "got other business. They charged 15 per cent. interest as a "regular rate. They never advertised or paid commissions to "people introducing business, and they never discounted bills or "lent money on personal security." It was argued for the defendants that though the plaintiff was a person who came within the first part of the section as he was a "person who "carried on a bona fide business not having for its primary object "the lending of money" yet he did not come within the second part of the section because the moneylending transactions were not "transactions in that business." It was argued that[3] "the "large sum lent by the plaintiff's firm had not been lent in the "course of their business of valuers or auctioneers, and to say "that the business of advancing money could be run together "with and help the other business was a very different thing from "saying that the lending of money was a natural incident of the "business of an auctioneer and surveyor," and further that because the business of valuers and auctioneers which the plaintiff carried on was a business which did not involve the lending of money, the moneys lent were not lent in the course of carrying on that business within the meaning of section 6 of the Act. The facts (though not the inferences) as stated in the above argument appear to have been admitted. Phillimore J. held that the plaintiff had brought himself within section 6 (*d*) and was not a moneylender within the meaning of the Act. The judgment has not been reported in detail, but it does not appear that the fact that the plaintiff secured valuation fees was the basis of, or a principal point in, the decision.

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[1] (1907) 23 T.L.R. 362.

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[2] 23 T.L.R. 362, 363.

[3] Ibid.

The case of *Edgelow* v. *MacElwee*[4] was cited by the appellant. In that case McCardie J. said[5]: "If the Court comes to the "conclusion that the solicitor carries on the actual business of a "money-lender as well as the vocation of a solicitor, then his "professional calling will not free him from the requirement of "registration under the Act of 1900." (Registration is a requirement of the English Act though not of the Singapore Ordinance.) Their Lordships agree. The mere fact that he carried on the vocation of a solicitor will not have released him. It was necessary to consider whether the primary object of his business was moneylending and, if not, whether the moneylending took place "in the course of and for the purposes" of that business. In the case considered by McCardie J. it was found on the facts that[6] "his vocation as a solicitor, so far as he carried it on, was "used as a mere disguise in order to give a colourable professional "appearance to the course of ordinary money-lending trans- "actions. . . ." The primary object of the business was moneylending and the solicitor could not therefore have been heard to say that the provisions of the Moneylenders Act, 1909, were not applicable to him. There are dicta in McCardie J.'s judgment upon which an argument was based before their Lordships that the exception could not be utilised by a person who had not shown that the money lent was used in connection with the primary objects of the business. As already stated, their Lordships are of opinion that this argument is not sound. It is sufficient if it is lent in the course of and for the purposes of the business as a whole, and not merely of its primary objects.

Figures based on the accounts produced in the case were placed before their Lordships to show that the profits from the moneylending branch of the business for the particular year to which they related were large when compared with other profits. It was suggested that these figures gave an indication of the relative size of the moneylending business when compared with other business done. Their Lordships cannot accept this suggestion. In any particular year the profits from the other business may be very low or it may even show a loss for reasons connected with that particular year. Without taking into account (this has not been done) this and other relevant factors no inference can be drawn. In any case there is a finding of fact by the trial judge, affirmed by the Court of Appeal, that the primary object of the business is not moneylending and consequently the submission loses most if not all its relevance.

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[4] [1918] 1 K.B. 205.

[5] Ibid. 208.

[6] Ibid. 209.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Slaughter & May; E. F. Turner & Sons.*

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Dec. 14.

KIRIRI COTTON CO. LTD. . . . . APPELLANTS;
AND
RANCHHODDAS KESHAVJI DEWANI . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Restitution — Illegal payment — Landlord and tenant — Payment by tenant of premium for lease — Whether recoverable — Whether parties in pari delicto—Rent Restriction Ordinance, No. 10 *of* 1949 (*Laws of Uganda*, 1951, *c.* 115), *s.* 3 (2).

Restitution—Mistake of law, money paid under—Illegal payment—Principles applicable.

Contract—Illegality—Contract prohibited by statute—Payment of premium for lease—Whether recoverable.

The appellant company, in consideration of granting to the respondent a sublease of a flat in Kampala, Uganda, "for "residence only" for a term of seven years and one day, asked for and received from him a premium of Shs. 10,000, contrary to the provisions of section 3 (2) of the Uganda Rent Restriction Ordinance, 1949. Neither party thought that they were doing anything illegal. The Ordinance made no provision for the recovery of illegal premiums, and the respondent, having gone into occupation of the flat under the sublease, thereafter claimed the return of the Shs. 10,000 as money received by the appellant company for the use of the respondent:—

Held, that the duty of observing the law was firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant, and the appellant company and the respondent were not therefore in pari delicto in receiving and paying respectively

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

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the illegal premium, which, therefore, in accordance with established common law principles, the respondent was entitled to recover from the landlord. The omission of a statutory remedy did not, in cases of this kind, exclude the remedy by money had and received.

The dictum of Lord Ellenborough in *Langton* v. *Hughes* (1813) 1 M. & S. 593 at 596, that "what is done in contravention of an "Act of Parliament, cannot be made the subject-matter of an "action," must be confined to cases where a party is seeking the aid of the court in order positively to enforce an illegal contract, and had no application to a case such as the present where it was sought to recover money paid under an illegal transaction.

Dicta of Lord Mansfield in *Lowry* v. *Bourdieu* (1780) 2 Doug. K.B. 468 at 472, and in *Browning* v. *Morris* (1778) 2 Cowp. 790 at 792 applied.

Smith v. *Bromley* (1760) 2 Doug.K.B. 696; *Moses* v. *Macferlan* (1760) 2 Burr. 1005; and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 62–64; 58 T.L.R. 308; [1942] 2 All E.R. 122 considered.

Rex v. *Godinho* (1950) 17 E.A.C.A. 132 at 134 disapproved.

It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat.

Order of the Court of Appeal for Eastern Africa affirmed.

Appeal (No. 32 of 1958) from a judgment and order of the Court of Appeal for Eastern Africa (April 18, 1958) affirming a judgment and decree of the High Court of Uganda (September 24, 1957) whereby it was ordered that judgment be entered for the present respondent for Shs. 10,000 in an action brought by him against the appellant company for the return of an illegal premium.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff (respondent) Ranchhoddas Keshavji Dewani was an Indian merchant living at Kampala in Uganda. The defendants (appellants) were the Kiriri Cotton Co. Ltd., which owned a block of flats in Salisbury Road, Kampala. The plaintiff claimed the sum of 10,000 shillings as money received by the defendant company for the use of the plaintiff. The High Court of Uganda (Lyon J.) gave judgment for the plaintiff for that amount, with costs. The Court of Appeal for Eastern Africa (O'Connor P., Forbes J.A. and Keatinge J.) affirmed the decision. The defendant company appealed to Her Majesty in Council.

The facts were simple. The plaintiff came to Kampala in March, 1953, and looked for somewhere to live. At the end of

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May, 1953, he took a flat in Salisbury Road, but he had to pay 10,000 shillings premium. He now said that that premium was illegal because it was in contravention of the Rent Restriction Ordinance, and he claimed the return of it.

The oral evidence was so short that it could be set out in full. Only the plaintiff gave evidence. He said:

"I came to Kampala, Uganda, in 1953—March. I lived with "a brother for 1½ months. I took a flat but I had to pay key "money. I was searching for some time.

"I got a flat at Kololo but after 2–3 days I had to leave as I "had trouble with a co-tenant. Then I got in touch with C. B. "Patel, after having difficulty. I borrowed 10,000/– from the "company as my brother was a director."

Cross-examination: "I paid the money by borrowing the "money."

It was apparent from that evidence, as the trial judge said, that during the negotiations for the flat the plaintiff was at a disadvantage. He was having difficulty in obtaining accommodation—and he only got the flat by paying a premium of 10,000 shillings, which he borrowed for the purpose. He took it under a sublease dated September 17, 1953. This was prepared by lawyers. It contained provisions whereby the defendant company, in consideration of the sum of 10,000/– paid by the plaintiff by way of premium, subleased to him Flat No. 1 on the first floor for residence only, having three rooms, one kitchen, one bathroom and one lavatory. The term was seven years and one day from May 31, 1953. The rent was 300/– a month payable monthly in advance. And there were several covenants on either side.

The Rent Restriction Ordinance, 1949, of Uganda, provided by section 3 (2): "Any person whether the owner of the property "or not who in consideration of the letting or subletting of a "dwelling-house . . . to a person asks for, solicits or receives "any sum of money other than rent . . . shall be guilty "of an offence and liable to a fine not exceeding Shs. 10,000 "or imprisonment for a period not exceeding six months or to "both such fine and imprisonment: . . ."

1959. Nov. 2, 3. *F. Elwyn Jones Q.C.*, *E. P. Wallis-Jones* and *C. B. Patel* for the appellants. It is common ground that, by reason of the provisions of the Rent Restriction Ordinance, 1949, of Uganda, this was an illegal premium, but, unlike the English Rent Act legislation, there is no provision in the Uganda

Ordinance for the recovery of illegal premiums. There is a finding of fact that both parties thought that the agreement was perfectly legal. There was no standard rent fixed for this flat at the date of the agreement and no evidence as to what it would be; at that date the amount was at large, so to speak; it was a matter of agreement, and this was the price which the respondent was willing to pay. There is no evidence here that the net result of the lease is an extortionate rent. This case can safely be considered in the light of the English common law, and the first submission is that the Uganda Ordinance does not give a right of recovery to a person who pays a premium rendered illegal by section 3 (2), and on the proper construction of the Ordinance the penalty for asking or receiving an illegal premium which is provided by that subsection is the sole remedy and no civil action can be founded thereon. That submission is supported by *Gray* v. *Southouse*[1]; see also *Cutler* v. *Wandsworth Stadium Ltd.*[2] If it is intended that money shall be recovered the statute always says so: *Green* v. *Portsmouth Stadium Ltd.*[3]

Secondly, even if there was a right of action, the respondent was barred by the proof of illegality as particeps criminis—albeit innocently—from suing to recover money which was paid by him voluntarily under the terms of an illegal agreement to which he was a party and which has subsequently been carried out; he aids and abets the commission of the offence. There was undoubtedly a substantive offence on the landlords' part. *Tompkins* v. *Pincent*[4] shows that there was in the present case a crime. The respondent here has been in possession and is still enjoying the fruits of his illegality, and he seeks in this action to have it both ways. The illegal contract, which is the basis of his action, has been carried out and there is no means of restoring the parties to the status quo ante. It was said in *Herman* v. *Jeuchner*[5] that " when the object of either the promise or the consideration " is to promote the committal of an illegal act, the contract itself " is illegal and cannot be enforced."

In *Kearley* v. *Thomson*[6] Fry L.J. said that: " As a general " rule, where the plaintiff cannot get at the money which he " seeks to recover without showing the illegal contract, he cannot

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[1] [1949] 2 All E.R. 1019.

[2] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[3] [1953] 2 Q.B. 190; [1953] 1 W.L.R. 487; 2 W.L.R. 1206; [1953] 2 All E.R. 102.

[4] (1701) 1 Salk. 141; sub nom. *Tomkins* v. *Pincent*, 2 Ld.Raym. 319.

[5] (1885) 15 Q.B.D. 561, 563; sub nom. *Hermann* v. *Zeuchner*, 1 T.L.R. 445.

[6] (1890) 24 Q.B.D. 742, 745.

"succeed. . . . To that general rule there are undoubtedly "several exceptions. . . . One of those is the case of oppressor "and oppressed, in which case usually the oppressed party may "recover the money back from the oppressor. In that class of "cases the delictum is not par. . . . Again, there are other "illegalities which arise where a statute has been intended to "protect a class of persons, and the person seeking to recover "is a member of that protected class. . . . In these cases of "oppressor and oppressed, or of a class protected by statute, the "one may recover from the other, notwithstanding that both "have been parties to the illegal contract." The respondent has the burden of proving that the application of the general rule to his case is excepted—that he is in a protected category. There was no evidence to support the finding that the respondent paid the illegal premium under oppression or duress or that he was at a disadvantage or imposed upon. In regard to protected classes, it would appear that there has always been some other basis of the action, such as want of consideration. There is a danger in enlarging the scope of this doctrine; one has to look at the particular Act and the particular circumstances of the case. In this case the tenant was a free agent, in full possession of all the facts, and was not in the circumstances a member of a class which ought to be protected, though certainly he was a tenant under the Ordinance, which does protect the tenant, but on the facts of this case he was acting voluntarily without pressure, and in relation to this case that doctrine does not apply. [Reference was also made to *Barclay* v. *Pearson*.[7]]

As to how the courts of this country have construed an Ordinance of this kind, assistance can be gained from the observations of Scrutton L.J. in *Sharp Brothers & Knight* v. *Chant*.[8] This present case does not go nearly far enough to make mere hardship a ground for vitiating the principle: *William Whiteley Ltd.* v. *The King*.[9] If the right of recovery of illegal premiums was well established in the English law, there would have been no need to legislate for it in the English Act. The respondent here is seeking to insert into the Ordinance language which is not there. It was rightly said in *Rex* v. *Godinho*[10] that "the giver of the "illegal premium is left in the position of one, who although he "himself has committed no substantive offence, has aided and

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[7] [1893] 2 Ch. 154, 164–165; 9 T.L.R. 269.

[8] [1917] 1 K.B. 771, 777; 33 T.L.R. 235.

[9] (1909) 26 T.L.R. 19; 101 L.T. 741.

[10] (1950) 17 E.A.C.A. 132, 134.

" abetted the commission of an offence by another. In these " circumstances he could not go to a Civil Court with clean hands " and the principle stated by Lord Ellenborough in *Langton* v. " *Hughes* [11] would have application, ' What is done in contravention of an Act of Parliament cannot be made the subject-" ' matter of an action.' "

The next submission is that this was a voluntary payment made as a result of mistake of law on the part of both parties. Such money paid under mistake of law, where the contract has been carried out, is never recoverable in an action for money had and received, which is the action brought in this case: *Harse* v. *Pearl Life Assurance Co.*[12]; see also on this point *Evanson* v. *Crooks*,[13] which has many similarities to the present case; it was there said that " the insurance company's representative being " in no better position and under no greater obligation to know " the law than the person he was addressing, the parties must " be treated as having dealt entirely on an even footing "; which is the position in the present case.

There are a number of cases which are qualifications on the broad principle expressed by Lord Mansfield in *Moses* v. *Macferlan* [14]; the view has been taken by many judges that the general rule was too widely expressed by Lord Mansfield: *Baylis* v. *Bishop of London* [15]; *Holt* v. *Markham* [16]; *Morgan* v. *Ashcroft* [17]; *Transvaal and Delagoa Bay Investment Co. Ltd.* v. *Atkinson.*[18] The point of time to which one must look in deciding whether the parties were in pari delicto was the time of the agreement, and looking at the circumstances of this case at that time, and on the facts found by the trial judge, the parties were in pari delicto.

Wallis-Jones following. The definition of " premium " by Warrington L.J. in *King* v. *Earl Cadogan* [19] has been generally recognised as convenient language. [Reference was made to *Jamnadas Salabhai* v. *Haribhai Mangalbhai Patel* [20] and *Sharp Brothers & Knight* v. *Chant.*[21]]

L. G. Scarman Q.C. and *C. F. Dehn* for the respondent. Ultimately the task of the Board is to interpret the statute to determine its scope and true purposes, and whether, in the light of the statute so construed, there is a right of action vested in the respondent. There are two sound ways, recognised by the common law, in this class of case in which that task of construction can be approached, and on either of them the respondent is entitled to succeed. They are: (1) The common law gives a cause of action for the recovery of money paid under an illegal contract when the plaintiff is not in pari delicto with the defendant. Illustrations of that can be found when one is faced with the oppressed and the oppressor, or with a class protected by statute. Whatever the position be with regard to oppressor and oppressed, on the facts here this case certainly comes within the second illustration—a statute passed to protect a class and the plaintiff being a member of that class. The importance of approaching the construction of a statute in that way is that one is not concerned to see whether upon a close construction the statute gives a right of action expressly or impliedly to somebody who suffers from its breach. The statute is prayed in aid because it makes the transaction under which the money passed an illegal transaction. All one has then to do to determine whether a plaintiff has a cause of action is to see whether the statute was passed to protect a class of persons and whether the plaintiff, on the evidence, comes within that class. It is a common law cause of action.

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[11] (1813) 1 M. & S. 593, 596.

[12] [1904] 1 K.B. 558; 20 T.L.R. 264.

[13] (1911) 106 L.T. 264, 268; 28 T.L.R. 123.

[14] (1760) 2 Burr. 1005.

[15] [1913] 1 Ch. 127; 29 T.L.R. 59.

[16] [1923] 1 K.B. 504, 513.

[17] [1938] 1 K.B. 49, 62; 53 T.L.R. 786; [1937] 3 All E.R. 92.

[18] [1944] 1 All E.R. 579.

[19] [1915] 3 K.B. 485, 492.

[20] Uganda High Ct., Civil Appeal No. 20 of 1949.

[21] [1917] 1 K.B. 771.

(2) The other approach—the more limited one—is that there is a right of action here upon the statute properly construed. That is to say, if this is a statute which upon its proper construction intended that it should be enforced by action, then the common law recognises the right to sue notwithstanding that a penalty is provided for the enforcement of the Act.

So far as "in pari delicto" is a question of fact, there are concurrent findings of fact here in favour of the respondent. The cases which support the first of the above propositions are *Browning* v. *Morris* [22]; Lord Mansfield's decision in that case has been consistently followed through the centuries; the present case is really a statutory example of oppression—taking money illegally from this class of person; *Smith* v. *Bromley* [23]; *Williams* v. *Hedley* [24]; (*Green* v. *Portsmouth Stadium Ltd.* [25] is distinguishable; it was a different kind of Act); *Smith* v. *Cuff* [26] is a classical case of money had and received to the plaintiff's use; *Atkinson* v. *Denby*.[27] The five above cases—three statute and two common law—were in the mind of Fry L.J. in *Kearley* v. *Thomson*,[28] and the passage from that case cited by Mr. Elwyn Jones (supra) summarises the argument for the respondent on this part of the case. The appellants concede that normally rent restriction legislation is for the protection of tenants; that certainly has been recognised in English law: *Woods* v. *Wise*.[29] It is perfectly plain that the scope and purpose of the Uganda Ordinance is intended for the protection of tenants. If there is a cause of action on the authorities, then there is at common law in the circumstances of this case a right to recover the money paid under the illegal contract. It is the common law operating on the statute.

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[22] (1778) 2 Cowp. 790.

[23] (1760) 2 Doug. 696.

[24] (1807) 8 East 378.

[25] [1953] 2 Q.B. 190.

[26] (1817) 6 M. & S. 160.

If the first point has been stated too widely, or is not applicable to this case, the second way of putting the case is, first, that there was here a breach of the statute by the appellants in that they received a premium contrary to the Ordinance. Secondly, the statute upon its proper construction, and having regard to convenience and public policy, requires that the plaintiff should have a civil right to recover notwithstanding the presence of a specific penal measure. It is on this way of putting it that it becomes relevant to look at the cases to see how the courts have approached the statute when it has been alleged by the plaintiff —as is alleged here—that notwithstanding the presence of a specific method of enforcement a civil action lies at the suit of the plaintiff. There are many such cases: *Cutler* v. *Wandsworth Stadium Ltd.*[30]; *Green* v. *Portsmouth Stadium Ltd.*[31]

The submissions with regard to the proper construction of the Ordinance are: (i) It was passed to protect tenants; (ii) if it be necessary to read into it by implication a provision that the plaintiff, as the tenant who has paid an illegal premium, shall have a right to recover, it should be read into it. [Reference was made to *Gray* v. *Southouse*.[32]] With regard to the mistake of law cases, the Board will appreciate that the respondent does not put this case forward as a mistake of law. There is a recognition of the cause of action for which the respondent contends in *Barclay* v. *Pearson*.[33] As to the insurance cases, in *Harse*

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[27] (1861) 6 H. & N. 778; 7 H. & N. 934.

[28] 24 Q.B.D. 742, 745.

[29] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[30] [1949] A.C. 398.

[31] [1953] 2 Q.B. 190.

[32] [1949] 2 All E.R. 1019.

[33] [1893] 2 Ch. 154.

v. *Pearl Life Assurance Co.*[34] there is a finding that the parties were in pari delicto, and a finding of no oppression. Either by reason of his being a tenant protected by the Ordinance, or of his being a person oppressed, the respondent was not in pari delicto with the appellants and is entitled to recover the premium.

Elwyn Jones Q.C. in reply. As to the submission that there is a common law right of action based on the principles of natural justice and equity, in regard to both bases on which the respondent put his case there is to be considered the element of whether it is right and proper in the circumstances of the case that the court should intervene to compel the appellants to repay this money. As was said in *Moses* v. *Macferlan*,[35] "the gist of this "kind of action is, that the defendant, upon the circumstances "of the case, is obliged by the ties of natural justice and equity "to refund the money." That is the basic principle, and it is of the essence of this case to show that there was an element of oppression, extortion or coercion. The most that can be said is that the respondent found difficulty in finding accommodation and that he was at a disadvantage. But to say from that that here was a case of the defendant taking undue advantage is a straining of language. They were in pari delicto. *Rex* v. *Godinho*[36] was correctly decided.

The scope and language of the Ordinance creating this offence must be considered and one is struck by the contrast between section 3 (1) and section 3 (2), which manifests a clear intention of the legislature that the remedy in regard to illegal premiums shall be through the criminal courts and not through a right of civil action. The Board should be very slow indeed to lend the respondent assistance in extricating himself from difficulties which are of his own creation.

Dec. 14. The judgment of their Lordships was delivered by Lord Denning, who stated the facts set out above, and continued: Their Lordships desire to point out at once that neither party thought they were doing anything illegal. The lease was for more than seven years and it was thought that, on a lease for that length of time, there was nothing wrong in asking for a premium or receiving it.

This was an easy mistake to make, as will be seen if one reads section 3 (1) and (2) of the Rent Restriction Ordinance:

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[34] [1904] 1 K.B. 558.

[35] 2 Burr. 1005, 1012.

[36] 17 E.A.C.A. 132.

"3.—(1) No owner or lessee of a dwelling-house or premises "shall let or sublet such dwelling-house or premises at a rent "which exceeds the standard rent.

"(2) Any person whether the owner of the property or not "who in consideration of the letting or subletting of a dwelling-"house or premises to a person asks for, solicits or receives any "sum of money other than rent or any thing of value whether "such asking, soliciting or receiving is made before or after the "grant of a tenancy shall be guilty of an offence and liable to a "fine not exceeding Shs. 10,000 or imprisonment for a period not "exceeding six months or to both such fine and imprisonment:

"Provided that a person acting bona fide as an agent for "either party to an intended tenancy agreement shall be entitled "to a reasonable commission for his services:

"And provided further that nothing in this section shall be "deemed to make unlawful the charging of a purchase price or "premium on the sale, grant, assignment or renewal of a long "lease of premises where the term or unexpired term is seven "years or more."

Anyone reading the last proviso to that section—without more—might well think that a premium could be charged on the lease of this flat for seven years and one day. He would readily assume that the word "premises" included a flat. But he would be wrong. For if he took pains to look back to the definition section 2, he would find that in this Ordinance, the word "premises" refers only to business premises and not to residential flats at all. And so this proviso does not apply to this flat—because by the very terms of the sublease it was let "for residence only." Their Lordships ought perhaps to set out the material words of the definition clause which produces this result—it says that "'dwelling-house' means any building or "part of a building let for human habitation as a separate "dwelling" and "'premises' means any building or part of a "building let for business, trade or professional purpose or for "the public service."

It was owing to the failure of the lawyers to refer to those definitions—or at any rate to appreciate the importance of them—that the mistake arose.

Their Lordships also think it right to point out that there was no evidence to show whether the premium of 10,000/- was extortionate or not. Their Lordships were told that no standard rent had been fixed for this flat because it was a new flat. It is obvious that if the standard rent were to be fixed at, say, 450/– a month for seven years, there would be nothing extortionate in a premium of 10,000/– down and a rent of 300/– a month thereafter: for it would come in the long run to much about the same.

Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the landlord received a premium contrary to the provisions of the Ordinance: and the question is whether the tenant can recover it back—remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered back.

This omission in the Ordinance was considered to be decisive by the Court of Appeal for Eastern Africa in a case a few years ago called *Rex* v. *Godinho*.[1] The court was then differently constituted from what it is now. The judges argued in this wise [2]: " We do not know the reason, but the Uganda legislature " in its wisdom has included in the Ordinance no provision " comparable to section 8 (2) of the Rent Restriction Act of " 1920. . . . Without this statutory right of recovery, the giver " of the illegal premium is left in the position of one who, " although he himself has committed no substantive offence, has " aided and abetted the commission of an offence by another. " In these circumstances he could not go to a civil court with " clean hands, and the principle stated by Lord Ellenborough in " *Langton* v. *Hughes* [3] would have application: ' What is done in " ' contravention of an Act of Parliament, cannot be made the " ' subject-matter of an action.' "

In considering the validity of this reasoning, their Lordships would point out that the observation of Lord Ellenborough was made in a case where a party was seeking the aid of the court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present, where a party is seeking to recover money paid or property transferred under an illegal transaction. In such cases the general principle was stated by Littledale J. in *Hastelow* v. *Jackson* [4]: " If two parties enter " into an illegal contract, and money is paid upon it by one to " the other, that may be recovered back before the execution " of the contract, but not afterwards." In accordance with this principle, so long as the illegal transaction has not been fully

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[1] (1950) 17 E.A.C.A. 132.

[2] Ibid. 134.

[3] (1813) 1 M. & S. 593, 596.

[4] (1828) 8 B. & C. 221, 226.

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executed and carried out, the courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property transferred. These were cases in which it appeared to the court that, even though the transaction was illegal, nevertheless it was better to allow the plaintiff to resile from it before it was completed, and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains; see *Taylor* v. *Bowers*,[5] which was approved by their Lordships' Board in *Pethcrpermal Chetty* v. *Muniandi Servai*.[6] But so soon as the illegal transaction has been fully executed and carried out the courts will not entertain a suit for recovery (see *Herman* v. *Jeuchner* [7]) unless it appears that the parties were not in pari delicto (see *Lowry* v. *Bourdieu*,[8] by Lord Mansfield).

It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not in pari delicto with the defendant. That was, indeed, the way he put his claim in the pleadings. After setting out the lease, the payment of the premium and the entry into occupation, the statement of claim proceeded simply to say: "By "virtue of the provisions of subsection (2) of section 3 of the "Rent Restriction Ordinance, the receipt of the said sum of Shs. "10,000 by the defendant from the plaintiff . . . was illegal but "the plaintiff is entitled to recover the same since he (the "plaintiff) was not in pari delicto with the defendant.

"The plaintiff claims the sum of Shs. 10,000 as money "received by the defendant for the use of the plaintiff."

The issue thus becomes: Was the plaintiff in pari delicto with the defendant? Mr. Elwyn Jones, for the appellant, said they were both in pari delicto. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True, it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus in pari delicto. In support of this argument the appellant referred to such well-known cases as *Harse* v. *Pearl Life Assurance Co.*[9];

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[5] (1876) 1 Q.B.D. 291.

[6] (1908) L.R. 35 I.A. 98.

[7] (1885) 15 Q.B.D. 561; sub nom. *Hermann* v. *Zeuchner*, 1 T.L.R. 445.

[8] (1780) 2 Doug.K.B. 468, 472.

[9] [1904] 1 K.B. 558; 20 T.L.R. 264.

William Whiteley Ltd. v. *The King* [10]; *Evanson* v. *Crooks* [11]; and particularly to *Sharp Brothers & Knight* v. *Chant.*[12]

Their Lordships cannot accept this argument. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers* v. *Ingham.*[13] If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back; see *Browning* v. *Morris*,[14] by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back; see *Harse* v. *Pearl Life Assurance Co.*,[15] by Romer L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. Their Lordships have in mind particularly his judgment in *Smith* v. *Bromley* [16] in notis, which he delivered when he sat at Guildhall in April, 1760: and his celebrated judgment three or four weeks later, on May 19, 1760, in *Moses* v. *Macferlan*,[17] when he sat in banco. Their Lordships were referred to some cases 30 or 40 years ago where disparaging remarks were made about the action for money had and received: but their Lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the law says he ought to

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[10] (1909) 26 T.L.R. 19.

[11] (1911) 28 T.L.R. 123.

[12] [1917] 1 K.B. 771, 776; 33 T.L.R. 235.

[13] (1876) 3 Ch.D. 351, 355.

[14] (1778) 2 Cowp. 790, 792.

[15] [1904] 1 K.B. 558, 564.

[16] (1760) 2 Doug. 696.

[17] (1760) 2 Burr. 1005.

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return to the plaintiff. This was explained by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[18] All the particular heads of money had and received, such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not in pari delicto with the defendant, are only instances where the law says the money ought to be returned.

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money." Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who "asks for, solicits or "receives any sum of money," but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson* v. *Youden*[19] and section 3 of the Rent Restriction (Amendment) Ordinance, 1954), but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the "queue," or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.

Seeing then that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: and it is not necessary to find a remedy given by the Ordinance, either expressly or by implication. The omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received. That is amply shown by the numerous cases to which their Lordships were referred, such as those arising under the statutes against usury, lotteries and gaming, in which there was no remedy given by the statute but nevertheless it was

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[18] [1943] A.C. 32, 62–64; 58 T.L.R. 308; [1942] 2 All E.R. 122.

[19] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.

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held that an action lay for money had and received. It was accepted, too, by Parker J. in his considered judgment in *Green* v. *Portsmouth Stadium Ltd.*[20]: and his decision was only reversed by the Court of Appeal[21] because they thought the statute there was of a different kind. It was not intended to protect bookmakers from the demands of race-course owners, but was rather for the regulation of race-courses. There was nothing in that case to show that the plaintiff was not in pari delicto with the defendants.

Their Lordships find themselves in full agreement with the judgment of the High Court of Uganda and of the Court of Appeal for Eastern Africa, and will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Hale, Ringrose & Morrow; A. F. & R. W. Tweedie.*

C. C.

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[20] [1953] 1 W.L.R. 487.

[21] [1953] 2 Q.B. 190; [1953] 2 W.L.R. 1206; [1953] 2 All E.R. 102.

[HOUSE OF LORDS.]

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Oct. 5, 6;
Nov. 4.

OUGHTRED . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Stamp duty—"Conveyance or transfer on sale"—Oral agreement for sale of reversionary interest to tenant for life—Subsequent deed of transfer—Effect of oral agreement—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Oral agreement to assign equitable interest—Whether disposer constructive trustee—Law of Property Act, 1925, *s.* 53 (1) (*c*), (2).

By section 54 of the Stamp Act, 1891: "For the purposes of "this Act the expression 'conveyance on sale' includes every instru-"ment . . . whereby any property, or any estate or interest in any

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* *Present*: LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM, LORD DENNING and LORD JENKINS.

"property, upon the sale thereof is transferred to or vested in a "purchaser, or any other person on his behalf or by his direction."

Schedule I imposes under the head of charge "conveyance or "transfer on sale, of any property" (except as therein mentioned) ad valorem duty on "the amount or value of the consideration for "the sale"; and under the head of charge "conveyance or transfer "of any kind not hereinbefore described" a fixed duty of 10s.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, a mother was tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son was absolutely entitled to the shares subject to her life interest. By an oral agreement made on June 18, 1956, it was agreed between them that on June 26 he would exchange his interest under the settlement and subsequent deeds for certain shares in the same company then owned by her to the intent that her life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the mother, the son and the trustees, the mother and son gave a release to the trustees. The release, after recital of the facts down to and including the oral agreement, recited that the trust fund, consisting of the shares, "is accordingly now held in trust for [the mother] absolutely," and that it was intended to transfer them to her. The transfer was expressed to be the consideration for the release. On the same day, by a deed made between the mother and the trustees, the shares in question were transferred to the mother, the consideration being expressed to be ten shillings:—

Held (Lord Radcliffe and Lord Cohen dissenting), that the transfer was assessable to ad valorem stamp duty. The transfer was an instrument whereby property in the shape of the settled shares or any estate or interest in that property was transferred "upon a sale thereof" to a purchaser in the person of the mother.

Per Lord Denning. By the transfer the mother acquired the son's reversionary interest as effectively as if he had conveyed it direct to her, and that was quite enough to attract stamp duty. Every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration (post, p. 233).

Per Lord Keith and Lord Jenkins. If the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract (post, p. 241).

Semble, that on making the oral agreement on June 18, 1956, the son became a constructive trustee of his equitable reversionary interest in the settled funds for the mother, notwithstanding section 53 (1) (*c*) of the Law of Property Act, 1925, by virtue of section 53 (2), but that nonetheless section 53 (1) (*c*) applied and, accordingly, the son could not assign that equitable interest to the mother except by a disposition in writing (see *per* Lord Radcliffe, post, p. 227, *per* Lord Cohen, post, p. 230, *per* Lord Denning, post, p. 233).

Attorney-General v. *Brown* (1849) 3 Ex. 662 considered.

Decision of the Court of Appeal [1958] Ch. 678; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Morris and Ormerod L.JJ.).

This was an appeal from an order dated May 15, 1958, of the Court of Appeal allowing with costs an appeal by the respondents, the Commissioners of Inland Revenue, from an order dated December 3, 1957, of the Chancery Division (Upjohn J.) in favour of the appellant, Phyllis Brown Oughtred, on a case stated by the respondents under section 13 of the Stamp Act, 1891. The case was stated for the opinion of the court as to the stamp duty chargeable on an instrument of transfer of shares in common form dated June 26, 1956, and made between Norman Oughtred, John Alwyn Oughtred, Doris Strachan Oughtred, and the appellant, being the trustees of a settlement dated January 1, 1924, as transferors and the appellant as transferee.

By virtue of the settlement dated January 1, 1924, a deed of appointment dated June 18, 1956, and made by the appellant, and a deed of release dated June 18, 1956, also made by the appellant, and in the events which had happened, the trustees of the settlement held the legal title in 100,000 ordinary shares and 100,000 preference shares of 10s. each in William Jackson & Son Ltd. in trust for the appellant for life and after her death for her only child, Peter Bentham Oughtred, absolutely. By an oral agreement made on June 18, 1956, between the appellant and Peter, it was agreed that Peter would on June 26, 1956, exchange his interest under the settlement and the above-mentioned deed of appointment and deed of release for 44,190 ordinary shares and 28,510 preference shares in the same company owned by the appellant to the intent that the life interest of the appellant in the trust fund (which consisted wholly of the settled shares) should be enlarged into absolute ownership thereof. The oral agreement was followed by the execution of three documents all dated June 26, 1956. (1) By a simple transfer the appellant transferred her 72,700 shares to nominees for Peter. This transfer was said to be "in consideration of 10s." (2) A deed of release was expressed to be made between the appellant of the first part, Peter of the second part and the trustees of the settlement of the third part, though it appeared in fact to have been executed

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only by the appellant and Peter. (3) By a simple transfer the trustees transferred the 200,000 shares to the appellant. The transfer was expressed to be " in consideration of 10s." The deed of release contained the following recitals: " (F) By an oral " agreement made June 18, 1956, between Mrs. Oughtred and " Peter it was agreed that Peter would on June 26, 1956, exchange " his interest under the settlement and the hereinbefore recited " deed of appointment and deed of release for [the shares] then " owned by Mrs. Oughtred to the intent that the life interest of " Mrs. Oughtred in the trust fund should be enlarged into absolute " ownership thereof. The trust fund which now consists of [the " settled shares] is accordingly now held by the trustees in trust " for Mrs. Oughtred absolutely as the trustees hereby acknowledge " and it is intended that the same shall forthwith be transferred " to Mrs. Oughtred or as she shall direct. (G) Mrs. Oughtred " and Peter being satisfied with all matters and things relating " to the execution of the trusts of the settlement have agreed to " make the release hereinafter contained." The operative part of the deed was as follows: " Now in consideration of the premises " and of the transfer to be made as aforesaid this deed witnesseth " that Mrs. Oughtred and Peter . . . do . . . release and discharge " the trustees . . . in respect of any act deed matter or thing " done or omitted by the trustees or any of them in or about the " execution of the trusts and provisions of the settlement."

The Inland Revenue claimed that the transfer of the 200,000 shares attracted ad valorem stamp duty. The Commissioners of Inland Revenue upheld this claim but, at the request of the appellant, stated a case for the determination of the High Court. Upjohn J. answered the question in favour of the appellant, directed that the ad valorem duty which had been paid should be repaid and fixed the duty at 10s. The Court of Appeal held that the transfer attracted ad valorem duty, allowed the appeal of the present respondents and ordered the present appellant to pay £662 10s., the agreed amount of the ad valorem duty (£663) less the 10s. paid under the order of Upjohn J.

Geoffrey Cross Q.C. and *Peter Whitworth* for the appellant. By section 54 of the Stamp Act, 1891: " For the purposes of this " Act the expression ' conveyance on sale ' includes every instru- " ment . . . whereby any property, or any estate or interest in " any property, upon the sale thereof is transferred to or vested " in a purchaser, or any other person on his behalf or by his " direction." The words " upon the sale thereof " are stressed.

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Here the property sold was the equitable reversionary interest, and this transfer was not a transfer of the equitable reversionary interest.

The Court of Appeal really say that the three documents should be read together and that at the end of the day the appellant had a beneficial interest which she did not have before, that two of these documents had only been charged at 10s. and the third should be treated as transferring the property sold. That is not how stamp duty should be approached. This transfer was a transfer of the legal estate, not the equitable estate. What is stampable is a conveyance on sale of the property contracted to be sold. Here all that was contracted to be sold was the reversionary interest in the shares, not the whole of the shares.

As to the effect of section 53 (1) and (2) of the Law of Property Act, 1925, Upjohn J. was right. The general principle is that whenever there is a contract for sale of property of which a court of equity will decree specific performance, the vendor is, pending completion or rescission, in the position of a constructive trustee for the purchaser: see Williams on Vendor and Purchaser, 4th ed., vol. I, pp. 545–546. Before the Acts of 1925 a mortgagor of land only had an equity of redemption and, if he contracted to sell the land, he was a constructive trustee of the equity of redemption. Exactly the same position obtains in the case of the sale of an interest in a personalty fund. Subject to the satisfaction of the purchase consideration, Peter was trustee of his equity for the appellant, who got an equitable interest. If she had then died, there would have passed to her executors as part of her property an equitable interest in the reversion.

In the case of an oral contract for the sale of a reversionary interest an equitable interest in the property passes. The right to specific performance creates a right of property. A court of equity can give specific performance of a contract for the sale of goods, for example, a valuable picture, identifiable goods which could not be replaced by other goods. If Peter had refused to carry out the present agreement, the appellant could have obtained specific performance, an order to him to execute a conveyance of his equitable reversionary interest.

As to the effect of an oral agreement for the sale of a reversion, see *Fleetwood-Hesketh* v. *Inland Revenue Commissioners.*[1]

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[1] [1936] 1 K.B. 351, 352–354, 357–358, 360–363, 364–365.

The equitable doctrine depends on the possibility of the court decreeing specific performance. In 999 cases of sales of goods out of 1,000 the doctrine of specific performance does not come into play at all. Only in the very rare case of an exceptional or unique property would a court of equity grant specific performance. In such a case the court of equity would hold that an equitable interest had vested in the purchaser.

Here no part of the equitable reversion passed under the transfer. Admittedly after the oral agreement Peter could have claimed the consideration, and if it had not been forthcoming he could have retained the equitable interest. Once that purchase consideration was satisfied, that transaction was quite independent of the transfer, which dealt not with the equitable interest but simply with the legal estate. Any interest which Peter had went from him when he received the purchase consideration, and the whole equitable interest was in the appellant when the transfer was made. It cannot be said that the document was a power of attorney given by Peter to the trustees to deal with his reversionary interest in the property.

The respondents say that the transfer is not simply the winding up of a trust but the completion of the contract to sell the reversionary interest. That is not so, because the reversionary interest had passed already and the conveyance completing the contract must be a conveyance of the subject-matter of the contract. As to *Attorney-General* v. *Brown*,[2] it was exactly like the case where shares are held by a nominee. But the vital difference between that sort of case and the present case is that here the sale was not of the shares but of the equitable reversionary interest in them which had passed already. In a sense the transfer was a document contemplated by the parties, or one of them, but that did not make it a conveyance completing the contract to sell the reversion. Peter was simply saying: "I "am no longer a beneficiary under this trust; my mother is the "sole beneficiary." After that it was simply a matter for the appellant and the trustees.

The doctrine of the equitable interest in property passing on the contract before the purchase price is paid applies to the case of the sale of shares as well as to the sale of land: see *Parway Estates Ltd.* v. *Inland Revenue Commissioners*.[3] If on the due day the purchaser cannot or will not pay the purchase-money, the vendor has an election. He may rescind the contract, thus destroying any interest created by it, or sue for specific performance. On the making of the contract the vendor can no longer say that he is the beneficial owner of the shares but, pending completion of the contract, he has certain interests and, if it goes off, he recovers the whole beneficial interest. Similarly, putting aside section 53 of the Law of Property Act, 1925, the same principle applies to an equitable reversionary interest in a trust fund as applies to shares. If the owner of an equitable reversionary interest contracts to sell it for a consideration to be paid in the future, the purchaser at once acquires a beneficial interest in the subject-matter and, if he gives notice to the trustees, they owe him a duty as a person who has a beneficial interest in the trust fund. As to section 53 (1) (*c*), the position may be put in two ways: either a contract of this sort is not a disposition of the equitable interest of the vendor within that paragraph or, if the transaction is to be so regarded, it is excepted by section 53 (2) and the vendor can be considered as a constructive trustee by reason of the right he has retained with regard to the purchase-money.

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[2] (1849) 3 Ex. 662, 663, 668–669.

[3] (1958) 37 A.T.C. 164, 165–168.

Inland Revenue Commissioners v. *G. Angus & Co.*[4] shows that it is on an instrument that ad valorem duty is payable, not on a transaction. Here it must be an instrument whereby any estate or interest in any property on the sale thereof is transferred to or vested in a purchaser. In order to succeed, the Crown must show that this instrument transferred the reversionary interest to the appellant on the sale of it, because what was sold was the reversionary interest, not the whole interest, in the shares. The Crown has failed to do that. The reversionary interest was vested in the appellant by the operation of the contract and the payment of the purchase-money; by the contract she acquired a beneficial interest. The reversionary interest, in the sense in which it was owned by Peter before the contract, ceased on the date of the contract; the beneficial interest ceased to exist as such because his beneficial interest changed entirely in character, being then reduced to the right to receive the purchase consideration. Before the contract Peter was the one person who, after his mother's death, could have called on the trustees to hand over the shares to him, subject to duty. If the contract went off he would be restored to being the sole person interested in the reversion; if the contract was performed he would cease to be interested in the reversion. When he received the consideration in pursuance of the oral contract it was no longer possible for him to say that he had any beneficial interest at all; the appellant had the whole beneficial interest. The gravamen of the appellant's case is that before the transfer came to be ✓ executed Peter had dropped out altogether. The contract having been made, the appellant acquired an equity in the property. The trustees, having received notice of the contract, could not have said that because it was only a matter of contract they were going to ignore her and deal only with Peter. She got her equity from Peter, though it is hard to say whether she got identically what Peter had previously or whether Peter's interest was not changed and she got a new sort of interest. Section 137 of the Law of Property Act, 1925, applies to equitable interests in land the rule in *Dearle* v. *Hall.*[5] If the appellant had given notice of the equitable assignment she would have had priority over every subsequent person dealing with Peter. The appellant chose to have the legal estate vested in her by the trustees; it was a reasonable and natural thing to do and, no doubt, everybody contemplated it and, in a sense, it was all part of the same transaction, but the transfer of the legal estate was not a conveyance on sale of the reversion within the meaning of section 54, as the Crown must say. It was not done by way of completing the agreement. The reversion did not vest in the appellant by the transfer, which merely perfected her legal title. It was a winding up of the trust. If the appellant had insisted that Peter should give her a formal conveyance in equity of his equitable reversion, that would have been stampable. The release is not to be construed as made in consideration of the transfer which the trustees were to make to the appellant.

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[4] (1889) 23 Q.B.D. 579, 580, 589–592, 592–594, 594–597; 5 T.L.R. 697.

If A agreed to sell a reversionary interest to B in consideration of £10,000, then, until the money was paid, A would still be interested in it and the trustees could not neglect his rights any more than those of B; both would have equitable interests in the reversion. Once the money was paid, A could drop out. If no document was required, there would be no stamp duty payable. If, say, a week later a formal transfer were executed, that would admittedly be stampable ad valorem, and, if a receipt were given, that would have to be stamped as a memorandum of an agreement for the sale of an equitable interest.

The respondents claim duty, not on the release or on the transfer of the consideration shares, but on the transfer of the legal estate in the settled shares to the appellant, and they must show that that transfer vested the reversion in her. But the reversion had already been transferred and, in any case, the trustees had not got the reversion vested in them. The duty is charged, not on a transfer of the shares, but on a transfer of the property sold, which was the reversion, and which the transfer did not vest in the appellant.

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[5] (1825) 3 Russ. 1.

There are two ways of putting the matter. One is that a contract by the owner of an equitable interest, which creates an equitable interest in the purchaser, cannot be regarded as a disposition of an equitable interest or trust subsisting at the time of the disposition, because it is not a disposition of the whole interest; it is rather creating a new equitable interest. If that be right, section 53 is out of the question, quite apart from subsection (2), because it is not a complete disposition of Peter's reversionary interest. If that be not right, and under the equitable doctrine of conversion and specific performance a disposition of the equitable interest has occurred, the case is within subsection (2) and Peter should be regarded as a constructive trustee. If the argument for the appellant is wrong on both points and nothing passed to the appellant under the oral agreement, at all events, once the consideration shares were transferred to Peter he would be estopped from asserting any interest, so that it cannot be said that the transfer to the appellant passed his equitable interest.

It is for the respondents to show that the transfer in question vested the reversion in the appellant, and that cannot be done unless the trustees are regarded as created in some way attorneys of Peter to transfer his reversion. He did not treat his reversion as a subsisting item of property which he empowered them to transfer. That would be a very extraordinary transaction and would be contrary to the recital; there is no reason not to accept recital (G) in the release as being right. It assumed that the consideration shares had already been transferred. In the absence of any contrary evidence the court should assume the documents to have been executed in that order.

Peter Whitworth following. As to what Lord Evershed M.R. said in the Court of Appeal,[6] it is not legitimate to introduce the word "legal" between "absolute" and "ownership" in recital (F). The meaning of the words in recital (F) to which he refers is that the appellant's equitable life interest should be enlarged into an absolute interest in the sense of an equitable interest as a right against the trustees, because that was the only thing with which Peter was capable of dealing; the legal ownership was not in him and he was not in a position to deal with it. Further, on June 18 there was no agreement that the legal title to the shares should go to the appellant. The agreement that the appellant should have the legal title was a new thing which arose on the date fixed for completion, June 26, and that was the reason for the release of that date, without which the trustees were entitled to refuse to make the transfer. Only the release was given as the consideration for that transfer. Contrary to what Lord Evershed M.R. said in the Court of Appeal, the transfer was not a following out of the oral agreement. Lord Evershed's comment [7] on what Upjohn J. said is not supported by the facts set out in the case stated. The oral contract was no more than that the appellant's equitable interest was to be enlarged. This transfer is plainly on its face and in fact a transfer of the legal title to the shares and as such attracts only 10s. stamp duty.

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[6] [1958] Ch. 678, 688; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443.

Section 53 (1) (*c*) of the Act of 1925 creates no difficulty for the appellant, because here it is a question, not whether or not the appellant has effectively acquired the reversion, but whether the transfer was a transfer on sale of it. All the facts point the other way. The decision of the Court of Appeal [8] is inconsistent with that court's express rejection of the Crown's contention that the transfer did in fact transfer the reversion. Once the release was executed, it was plain that there was no interest of any kind in Peter, and so the transfer which followed, which was purely for the purpose of putting the appellant on the register of the company, was not necessary in relation to the contract between herself and him. The fact, if it was a fact, that it might strengthen her title as against him was not a matter which attracted any additional duty beyond the fixed duty of 10s.

Richard Wilberforce Q.C. and *E. B. Stamp* for the respondents. The House is concerned with three words of taxation, "conveyance on sale," which contain several problems. They are not as simple as they look, but certain ingredients are here established beyond argument. (1) There is a conveyance or transfer. (2) There was a sale—a sale by Peter of his reversionary interest to his mother. The relevant Act distinguishes between (a) conveyances on sale, (b) conveyances not on sale and (c) conveyances which operate as voluntary transfers, dispositions inter vivos. When there is a transfer, one is entitled to look outside the instrument to see which of those it is. (3) This conveyance was on the occasion of the sale, as appears from the recitals in the deed of release: see section 62 of the Stamp Act. (4) This transfer was not made by the vendor of the property (Peter), but by other persons (the trustees). But the Act does not require that the conveyance should be by the selling party. It is common for the equitable owner of shares to sell his interest in them, the conveyance being made by someone else, and neither the head of charge in Schedule I to the Stamp Act nor section 54 requires that the final conveyance should be made by the person who is the seller under the contract.

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[7] [1958] Ch. 678, 689.

[8] Ibid. 689–690.

So far all the ingredients are present and the only difficulty arises from the fact that this transfer was not, expressly at any rate, a transfer of the identical property sold, so that one must establish what the relationship between those two was and what the Act required it to be. It must be within the power of the person who executed the transfer to deal with the property. The subject-matter of this contract was an equitable reversionary interest in shares, an interest under a trust, and what was transferred on the face of the transfer was shares, not an estate or interest in the reversion; those two elements must be put in relation to each other. The reversionary interest, the subject-matter of the contract, was included in the conveyance made by the trustees; it passed by virtue of what was included in the conveyance. Upjohn J. in the court below [9] accepted that in relation to a transfer by nominees, but he did not apply it to this case, on the ground that this transfer was essentially the winding up of a trust.

It is misleading to describe an owner of property as owning the legal estate and the equitable estate as two separate things; he simply owns the property. A transfer by a legal owner of property passes, by virtue of his legal ownership, the property to the transferee in every case except where there is outstanding an equitable interest the owner of which wishes to enforce it. Where there is no equitable interest outstanding, one does not stop to inquire about the position of the equitable interest. A legal owner passes the whole property to a purchaser for value without notice, even though there is an equitable estate outstanding. He can also pass the whole of the property to another if he is authorised and directed to do so by the only person or persons who have equitable interests. The only case where he does not pass the

[9] [1958] Ch. 383, 390–391; [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252.

title is where there is an equitable owner with an equitable interest not concurring in the sale, which is not to a purchaser for value without notice.

What occurred here was identical from the legal point of view with the position as it would have been if Peter had joined in the deed of transfer. It is not submitted that the release itself passed any interest, but it is the evidence of what was going to be done to complete the oral contract; it tells one that the oral contract was to be carried out by means of the transfer to be made by the trustees. It puts the completion of the transaction in the future. The release is the evidence of what the oral agreement was and how the parties contemplated that it was to be completed. There is no difference between the present case and that where there are shares held by a nominee. One has exactly the same legal transaction, the same legal relationship; the conveyance is made, not by the vendor himself but by someone holding as a bare trustee for him. He simply conveys the property. This brings the case exactly into line with *Attorney-General* v. *Brown*.[10] The view of the Court of Appeal is that this is one transaction, not two transactions, that it is a conveyance on sale and that it is not to be snipped into bits. There are many other cases where what is sold is not identical with what is conveyed, yet what is conveyed must include what is sold and the transaction must be treated as a conveyance on sale of what is sold; just as here the whole legal estate embraces the partial interest. The matter cannot depend on whether one has the whole interest in the property or whether the equitable interest is divided between different persons. A conveyance on sale takes place when there is a conveyance by any person who stands in the position of a trustee for the vendor in respect of the interest which is contracted to be sold.

The appellant had an equitable life interest and Peter a reversionary interest; the equitable interest consisted in the claim against the trustees. There is no legal difference between that situation and the case where a trustee holds the whole property on trust for X where there is an equitable interest directed at the trustee, and the trustee is in a position to convey to X with the legal interest an equitable beneficial interest. In the present case the trustees could do what they did because they had the previous assent under seal of Peter.

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[10] 3 Ex. 662.

If shares are held on trust for A when alive with remainder to B, and the trustees wish to sell them on a change of investments, the purchaser expects to receive not merely the legal interest but also the beneficial interest. He does so either because there is an express power of sale in the settlement or because the assent of the beneficiary has been obtained or under an order of the court. Thus the trustee can pass not only the legal interest in the property, which he has, but also the beneficial interest.

A person, A, having a total equitable interest in shares held by a nominee, B, might create by deed a nominal reversion in favour of X, keeping for himself an interest for, say, his own life, with the reversion expectant to X, to whom he wished to pass the shares. The beneficial interest being thus split between two persons, is that case to be distinguished from that of shares held by a bare nominee, saying that the legal interest is passed by the legal owner, B, that the transfer by him is not a transfer on the sale, since it does not include the beneficial interest of A? There can be no difference between the case where the beneficial owner joins in the transfer by the legal owner and a case where separately and previously he authorises or directs the legal owner to transfer. Exactly the same legal consequence follows. The transfer is a transfer on the sale of A's interest to X in precisely the same way as if A had remained the absolute owner of the shares and had purported to sell his absolute interest to X. The situation is exactly the same, whether the equitable interest is all in the hands of the vendor, as in the ordinary Stock Exchange case of a nominee holding, or whether it is split up by a life interest as against a reversion, or in any other way between the vendor and the intending purchaser. Taking the case of a sale of land by a tenant for life to a reversioner, the legal estate is vested in the tenant for life, the vendor. One could not say that there was not a transfer on sale of his life interest, albeit what was transferred was the legal estate. The life interest would be included in the transfer. If the life tenant bought the reversioner's interest, it might well be unnecessary to have more than an oral contract, because he had the legal estate already.

From the deed of release, particularly recital F, it is plain that the parties contemplated that the transaction should not be left in contract but should be completed by documents which would have the effect of vesting in the appellant the whole legal and beneficial interest in the shares. There was recited the oral agreement under which there was to be an exchange between

Peter and the appellant, he giving his interest under the settlement and she giving the 72,700 shares, to the intent that her life interest should be enlarged into absolute ownership. There is then recited erroneously that the whole trust fund at that point was held in trust for the appellant absolutely. Previous to the transfer it was not correct that the appellant was the only beneficiary under the trust, which could, accordingly, be wound up in her favour. Though the beneficial interest had passed, the reversion was still capable of being conveyed by Peter to the appellant. If one was looking only at who was beneficially entitled to the property, it would be correct to say that the only person who had any beneficial interest was the appellant. But, however great, for practical purposes, the appellant's beneficial interest, either after the contract or after the transfer of the consideration shares, there was still room for a transfer completing it. The parties did not intend to leave this in contract. Even if the recital was literally true, the intention emerged that at the end of the day the appellant was to have both the legal and the beneficial interest. The only alternative to the view that the conveyance on transfer included and passed the beneficial interest was that the appellant got it contemporaneously, not by the document of transfer of the settlement shares but by virtue of the transfer of the consideration shares.

In a case of conveyance on sale stamp duty is not charged on the property conveyed but on the consideration.

One must consider whether it is correct to say that the equitable or beneficial interest passes on the contract or on the payment of the consideration. In general on a contract of sale of land a beneficial interest passes to the purchaser, and in that sense the vendor becomes trustee for him. Nevertheless, in relation to land the contract is always followed by a conveyance. That is a conveyance on sale operating as a conveyance of the property which is the subject-matter of the sale. Turning to the case of personal property and making no distinction between real and personal property, the situation is exactly the same. Very often there is a conveyance and, if there is, it is a conveyance or transfer within the section. To say otherwise would be to destroy the distinction between a contract and a conveyance: see section 59 of the Stamp Act and *Inland Revenue Commissioners* v. *G. Angus & Co.*[11] Thus, taking the case of an equitable interest, one section enacts that a contract for its sale requires an ad valorem stamp and another section enacts that such a stamp is required on an actual transfer, but, if the appellant's argument is right, there is no such liability. In *Fleetwood-Hesketh* v. *Inland Revenue Commissioners* [12] it was held that a formal transfer was not part of the transaction as intended by the parties, and therefore, exceptionally, it was not a case where a contract to sell an equitable interest was to be completed by a conveyance. The phrase that "the property passed when the "oral agreement was made" is not to be read literally. *Garnett* v. *Inland Revenue Commissioners* [13] is a case where, whatever might have been done, it was possible to conclude from what the parties did and said that they had chosen to proceed by way of deed and not without one. In *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [14] it is indicated that, although an equitable interest has already passed by virtue of a contract and payment of the consideration and a conveyance is not required to vest it in the purchaser, yet, when there is a conveyance, it is charged with duty on the value of the equitable interest which has been the subject-matter of the sale.

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[11] 23 Q.B.D. 579.

One only gets into confusion in this case by splitting property into legal and equitable interests when one is dealing with the subject-matter of the sale; when a conveyance takes place one conveys the property which one has contracted to sell, and it is not profitable to inquire whether some of the beneficial interest has been extracted by the contract and has passed. Otherwise the questions would arise: What would happen if the contract went off in some way? Would the property go back and, if so, at what point? Although in some cases one may find that what the money was paid for was the equitable interest, that that passed before the conveyance and that therefore a conveyance was not necessary to pass it, yet, when the conveyance is executed, it is still a conveyance on the sale. The general doctrine that the equitable interest or a beneficial interest passes on execution of the contract or on payment of the consideration does not provide a solution to what was done in this case. The House must decide whether the document was a conveyance on sale of the subject-matter, the reversionary interest.

As to section 53 (2) of the Law of Property Act, 1925, it is accepted in general that the expression "constructive trust" covers the case where property or a beneficial interest passes

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[12] [1936] 1 K.B. 351, 363.

[13] (1899) 81 L.T. 633, 636–637.

[14] [1958] A.C. 549, 562–564; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

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to a purchaser on the execution of a contract of sale, but the doctrine has no real significance when applied to such a thing as a reversion, which does not produce any income and depends on a certain relationship towards trustees. Even if in some sense a constructive trust came into existence, the trustees of the settlement would still be trustees for the original beneficiary, the vendor. It is unreal to seek to apply the doctrine of constructive trusts here. Trustees with notice of a contract could not safely make payment to the purchaser; if pressed, they should pay the money into court. Assuming that the doctrine of constructive trusts applies to such things as reversions, even so it cannot dispense altogether with a document or with compliance with section 53 (1) (*c*), which requires that a disposition of a subsisting equitable interest must be in writing. It cannot be right that an oral contract can transfer property when an oral disposition cannot. Subsection (1) (*c*) does not apply only to voluntary dispositions of equitable interests. Dispositions include transactions for value as well as voluntary transactions: see section 205 (1) and (2). At most a constructive trust creates a certain person constructively trustee for another; it is not meant to go further so as to replace instruments. Under section 53 (2), provided certain conditions apply, the owner of an equitable reversionary interest can become a constructive trustee of it for a purchaser, but that does not have the effect that, when the constructive trust comes into operation, all interest shifts from him to the purchaser, because that is prevented by subsection (1) (*c*). Some beneficial interest may arise in the purchaser, but the original owner does not dispose of his subsisting interest and cannot get rid of it except by an instrument in writing. If the owner of a subsisting equitable interest, e.g., a reversion, transfers it in writing to a stranger for consideration, the effect of section 53 (2) may be that the transferee must hold it as trustee for the original transferor. The document is not invalidated or replaced, but a certain equitable right arises from certain circumstances. That is perfectly consistent with section 53 (1) (*c*), which says that a transfer of title must be in writing. It cannot be said that the appellant had at the time of the release or by virtue of the payment of the consideration acquired the whole of the reversionary interest of Peter. Assuming a case of a constructive trust by virtue of an oral agreement, that does not replace, or dispense with the necessity for complying with subsection (1) (*c*) with regard to the disposition. Subsection (2) operates but does not get over subsection (1) (*c*). However unnecessary or superfluous from a practical point of view a disposition within subsection (1) (*c*) might be, it would be a conveyance.

The transfer of the legal interest was a "conveyance on sale" within section 54 of the Act of 1891. The constructive trust doctrine does not help one to replace a transfer; there still remains the necessity for a disposition in order to carry over the reversion. The transfer was both a conveyance on sale and a winding up of the trust. It does not matter how the thing was done. Peter could have transferred his interest to his mother direct or he could choose the other way of authorising the trustees to make the transfer. The release of June 26 was not a complete release by Peter of all his beneficial interest in the trust; there still remained something which could be conveyed, notwithstanding the operation of the constructive trust. The release did not amount to an authority to the trustees to make a transfer or to a participation by Peter to exactly the same extent as if he had ultimately himself joined in the document of transfer. Assuming the trustees had signed this document, they would still be under an obligation in respect of the trust. There was still something to be done which was part of the bargain of the sale of the reversionary interest. The analysis of the transaction given by the Court of Appeal is correct, in that it was by the transfer that the title of the legal and beneficial interest became vested in the appellant. As between the three documents executed on June 26, it was clearly not the deed of release which operated to transfer the equitable interest.

Another question is what weight should be attributed to the word "thereof" in the phrase "upon a sale thereof," and how far there should be identity between what is contracted to be sold and what is sold. Section 1 of the Stamp Act, 1891, says that the duties to be charged shall be those specified in Schedule I. In that Schedule under the heading "Conveyance or transfer on "sale of any property" are the words: "And see sections 54, "55, 56 . . ." Section 54 is the relevant section, not a definition section, but an inclusion section, bringing into the head of charge certain things which otherwise might not be in it, such as orders of the court or vesting instruments; it also deals with the case where what is transferred is, say, an equitable interest in the property sold. Section 86 is a "meaning" section, and where in one section of an Act there is the word "means" one must be reluctant to give the word "includes" in another section any but its natural sense. Accordingly, it is only necessary to show a "conveyance or transfer on sale of any property," without confining oneself to the limits of section 54. The conveyance or transfer must be in some way related to the sale, but it is not necessary to be very precise, because the charge is imposed on the consideration. The words "conveyance or transfer on sale "of any property" distinguish the case of a transfer on sale from other transfers which are not on sale. Unless one brings in section 54, one is not tied to a property. The consideration must be related to the sale—that is what ties it up, but that does not oblige one to find that the conveyance itself has to pass exactly that which is sold; it need not even be a property which includes that which is sold. The fact that one must bring in the consideration automatically results in relating the conveyance, which is to be charged, to the sale; it is irrelevant what the property is. Compare section 54 with section 62. If one confines oneself to the Schedule to the Stamp Act, one is liberated from any restriction which might otherwise be imposed by the literal words of section 54.

Parway's case [15] did not go into the actual nature of the beneficial interest that passed to the purchaser, but simply said that the selling company was not, at the relevant time, the beneficial owner of the shares. That is not challenged. *Attorney-General* v. *Brown* [16] is relied on; the transaction there was similar to that in the present case.

E. B. Stamp following. By way of illustration, suppose the following circumstances: The appellant and Peter entered into an oral agreement with an insurance company to sell their respective interests for two separate sums of £50,000 each; completion was to be on June 26, 1956, and on that day the money was paid to the company and a release very much in the form of the release in the present case was executed by the appellant and Peter in favour of the trustees, with similar recitals. Suppose also that on the same day a conveyance of the shares was executed by the trustees in favour of the company and expressed to be in consideration of 10s. That conveyance would certainly be a conveyance on sale. The company would have purchased the two equitable interests and the shares themselves would have been transferred by the trustees to the company. The two equitable interests would have vested in the purchaser. That is very much what happened here. As in the hypothetical case the conveyance was made by the authority of the two vendors, so

[15] 37 A.T.C. 164.

[16] 3 Ex. 662.

here the conveyance was made by the authority of Peter, if not by his direction. It is sufficient to vest an equitable estate in a purchaser that the legal estate should have been transferred with the authority of the owner of the equitable interest.

Geoffrey Cross Q.C. in reply. On the terms of the release the contract between Peter and the appellant contained no term to the effect that the shares should be transferred to her by the trustees. What she did was entirely a matter for her, and Peter had nothing to do with it. All he said was that on June 26 he would exchange his reversionary interest for the consideration shares. These shares must be assumed to have been transferred before rather than after the release.

It is not for the appellant to establish that the whole of the beneficial interest, in every sense of the expression, was vested in her before the transfer of the legal estate in the shares; it is for the respondents to show that that transfer operated as a transfer to her of Peter's reversionary interest and to reach that conclusion without straining the language of the Stamp Act.

Section 54 of the Act cannot be ignored. If different requirements were imposed by the Schedule from those imposed by that section, then what are prima facie conveyances on sale (in the case of which, according to the respondents' argument, section 54 is not needed) would call for the application of considerations different from the case of sales carried out by instruments which are only brought into play by section 54. That would be an impossible state of affairs. The Schedule and section 54 must be read together, and that makes it plain that the respondents must show that by this transfer the equitable reversion of Peter was vested in the appellant. Even if after the oral contract of sale and the payment of the consideration some scintilla of a beneficial interest had been left in Peter (see section 53 of the Act of 1925), he would have been estopped from asserting it.

The nominee cases relied on by the respondents have nothing to do with the point: see *Attorney-General* v. *Brown*[17] and *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[18] They were cases where trustees held property on trust for the vendor, who could have called on them to transfer the legal estate to him and he could then have gone on to transfer it to the purchaser, but instead, as a short circuit, there was a direct transfer from the trustees to the purchaser. But here there was no interest vested in the trustees on trust for Peter, which he could have asked them to convey to him before it went to the appellant. In the face of section 54 of the Act of 1891, it would be going further than any case cited to say that this was a transfer of the reversionary interest of Peter. If, on their argument on section 53 of the Act of 1925, the respondents were right in suggesting that there was a scintilla of interest left in Peter despite the oral contract for sale and the satisfaction of the consideration, they would be faced with the difficulty of the requirements of section 53 (1) (*c*). Either everything had gone to the appellant before under the oral contract and satisfaction of the consideration, or, alternatively, there was a scintilla left in Peter which he could have assigned himself by a document which would have attracted ad valorem stamp duty, but which he would be estopped from asserting; but by no possibility could one treat the conveyance as vesting the equitable reversionary interest itself in the appellant.

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[17] 3 Ex. 662.

[18] [1958] A.C. 549.

The judgment of the Court of Appeal was inconsistent because, on the one hand, they seemed to recoil from the idea that the transfer was a transfer of the reversionary interest, but their alternative view came to much the same thing in other words, namely, that it did transfer the equitable interest. The approach of Upjohn J. should be preferred.

Their Lordships took time for consideration.

November 4. LORD RADCLIFFE. My Lords, the facts of this case are very simple. Mrs. Oughtred and her son were respectively entitled to the life interest and absolute reversion in a settled fund consisting of shares in a limited company. They thus owned between them the whole equitable interest in those shares, which were vested in Mrs. Oughtred and two other persons as trustees of the settlement. On June 18, 1956, an oral agreement was made between Mrs. Oughtred and her son to the effect that on June 26 she would transfer to him certain other shares in the same company which were her own absolute property, and in exchange he would make her the absolute beneficial owner of the settled shares by giving up to her his beneficial reversionary interest.

On June 26 three documents were executed. It is obvious that they were all part of the same transaction, though I will mention them in the order which gives them logical coherence. First, Mrs. Oughtred transferred her own shares to her son. Secondly, the two of them joined in giving a release to the trustees of the settlement in respect of any " act deed matter or thing done or omitted " by the trustees or any of them in or about the execution of " the trusts and provisions of the settlement," and the trust fund being (I quote from recital (F) of the deed of release) " now " held by the trustees in trust for Mrs. Oughtred absolutely as " the trustees hereby acknowledge," the trustees undertook to transfer the settled shares to Mrs. Oughtred or as she should direct. Thirdly, the trustees executed a deed of transfer accordingly vesting the legal title to the shares in Mrs. Oughtred.

It is this last-mentioned deed which is claimed by the Commissioners of Inland Revenue to be a conveyance on sale of the son's equitable reversionary interest within the meaning of section 54 of the Stamp Act, 1891, and, as such, liable to ad valorem duty upon the value of the shares transferred by Mrs. Oughtred in exchange for it. The case stated, upon which this appeal arises, presents that claim as a question for decision by the court.

It is plain, of course, that ostensibly the transfer is not a conveyance of the equitable reversionary interest at all. It deals with the shares themselves, not with any beneficiary's particular interest in them. The commissioners, however, arrived at their opinion that the transfer was chargeable ad valorem by a process of reasoning which is set out in paragraph 12 of the case stated. They took the view that, having regard to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925 (a provision which requires that any " disposition " of an equitable interest subsisting at the time of the disposition must be in writing), they must treat the recital that the shares held by the trustees were " now held " in trust for Mrs. Oughtred as incorrect; and they appear to have concluded, without more, that, as, apart from the transfer now in question, no instrument in writing stamped with ad valorem duty transferring the son's equitable reversionary interest had been produced to them, they ought to treat the transfer of shares itself as constituting the necessary instrument.

This line of reasoning is, in my view, fallacious. It contains two false assumptions. One is that under English law it must have been wrong to describe the settled shares as held by the trustees on June 26 in trust for Mrs. Oughtred absolutely unless the son's reversion had been assigned to her in writing so as to satisfy section 53 (1) (*c*) of the Law of Property Act, 1925. The other is that somehow there must exist as a result of the transaction covered by the recited facts an instrument of conveyance capable of being charged to duty ad valorem, since otherwise there would be no ad valorem duty payable. The second assumption is one which, I am bound to say, appears to me to be the foundation of the argument for the commissioners' claim, no matter in what form it is expressed.

Yet the law with regard to liability to stamp duty is clear enough. The duty is charged upon instruments, if they exist and come within any of the categories prescribed by the Act. It is not charged upon transactions. Thus property such as chattels, which by law pass on delivery, can be transferred from one owner to another without attracting duty. Again, though an agreement for sale may be chargeable ad valorem, since the Act has so required, an oral agreement for the sale of property involves no charge to duty because no instrument is brought into existence to effect or to record it. The whole point of the present appeal seems to me to turn on the question whether it is open to a court of law to deduce from the documents of this case that Mrs. Oughtred's title to her son's equitable reversionary interest rested upon anything more than the oral agreement which admittedly took place.

My Lords, on this short point my opinion is that such a deduction is not open to a court of law. The materials that would support it are simply not there. I think that the judgment of Upjohn J. in the High Court, which was in favour of Mrs. Oughtred, was correct, and I agree with his reasons. I am afraid that I do not agree with the judgment of the Court of Appeal, which was in favour of the commissioners, or with the conclusion which, as I understand, commends itself to a majority of your Lordships.

The reasoning of the whole matter, as I see it, is as follows: On June 18, 1956, the son owned an equitable reversionary interest in the settled shares: by his oral agreement of that date he created in his mother an equitable interest in his reversion, since the subject-matter of the agreement was property of which specific performance would normally be decreed by the court. He thus became a trustee for her of that interest sub modo: having regard to subsection (2) of section 53 of the Law of Property Act, 1925, subsection (1) of that section did not operate to prevent that trusteeship arising by operation of law. On June 26 Mrs. Oughtred transferred to her son the shares which were the consideration for her acquisition of his equitable interest: upon this transfer he became in a full sense and without more the trustee of his interest for her. She was the effective owner of all outstanding equitable interests. It was thus correct to recite in the deed of release to the trustees of the settlement, which was to wind up their trust, that the trust fund was by then held upon trust for her absolutely. There was, in fact, no equity to the shares that could be asserted against her, and it was open to her, if she so wished, to let the matter rest without calling for a written assignment from her son. Given that the trustees were apprised of the making of the oral agreement and of Mrs. Oughtred's satisfaction of the consideration to be given by her, the trustees had no more to do than to transfer their legal title to her or as she might direct. This and no more is what they did.

It follows that, in my view, this transfer cannot be treated as a conveyance of the son's equitable reversion at all. The trustees had not got it: he never transferred or released it to them: how then could they convey it? With all respect to those who think otherwise, it is incorrect to say that the trustees' transfer was made either with his authority or at his direction. If the recital as to Mrs. Oughtred's rights was correct, as I think that it was, he had no remaining authority to give or direction to issue. A release is, after all, the normal instrument for winding up a trust when all the equitable rights are vested and the legal estate is called for from the trustees who hold it. What the release gave the trustees from him was acquittance for the trust administration and accounts to date, and the fact that he gave it in consideration of the legal interest in the shares being vested in his mother adds nothing on this point. Nor does it, with respect, advance the matter to say, correctly, that at the end of the day Mrs. Oughtred was the absolute owner of the shares, legal and equitable. I think that she was: but that is description, not analysis. The question that is relevant for the purpose of this appeal is how she came to occupy that position; a position which, under English law, could be reached by more than one road.

Lastly, I ought perhaps to say that I do not myself see any analogy between the operations embraced by the oral agreement and documents and the common case of a sale of shares by an owner for whom they are held by a nominee or bare trustee. What is sold there is the shares themselves, not the owner's equitable interest. What is passed by the transfer executed by his nominee is the shares, according to the contract, without any incumbrance on the title, equitable or legal. It is, I think, a misunderstanding of the law to speak of the nominee as transferring his beneficiary's previous equitable interest to the purchaser.

For the reasons which I have given I am in favour of allowing the appeal.

LORD COHEN. My Lords, the question for your Lordships' decision is whether the Inland Revenue were entitled to claim ad valorem duty on a deed (to which I shall refer hereinafter as "the transfer") dated June 26 whereby four transferors (the trustees of the settlement hereinafter mentioned) were expressed to transfer 100,000 preference shares of 10s. each and 100,000 ordinary shares of 15s. each in a company called William Jackson & Son Ltd. to the appellant in consideration of ten shillings.

The commissioners upheld the claim of the Inland Revenue but, at the request of the present appellant, stated a case for the determination of the High Court. This came before Upjohn J. on December 3, 1957. He answered the question in favour of the present appellant, directed that the ad valorem duty which had been paid should be repaid and fixed the duty at 10s. The commissioners appealed to the Court of Appeal, and on May 15, 1958, the Court of Appeal, holding that the transfer attracted ad valorem duty, allowed the appeal and ordered the present appellant to pay £662 10s., that is, the agreed amount of the ad valorem duty (£663) less the 10s. paid under the order of Upjohn J. It is from that order of the Court of Appeal that the appeal now before your Lordships is brought.

My Lords, the facts have already been sufficiently stated by the noble and learned Lord on the Woolsack. I agree with him that to give logical coherence to what was done your Lordships should treat the three documents executed on June 26 as having been executed in the following order: (1) the transfer by the appellant to her son Peter of the shares which were the consideration for the oral agreement by Peter to make her the absolute beneficial owner of the settled shares; (2) the deed of release; (3) the transfer.

Before Upjohn J. the respondents argued that having regard to section 53 (1) (*c*) of the Law of Property Act no equitable interest passed to the present appellant under the contract and therefore Peter's beneficial interest in the settled shares must have passed under the transfer. The material portions of section 53 are as follows: "(1) Subject to the provisions hereinafter "contained with respect to the creation of interests in land by "parol— . . . (*c*) a disposition of an equitable interest or trust "subsisting at the time of the disposition, must be in writing "signed by the person disposing of the same, or by his agent "thereunto lawfully authorised in writing or by will. (2) This "section does not affect the creation or operation of resulting, "implied or constructive trusts." Upjohn J. rejected the respondents' argument. He held that subsection (2) afforded a complete answer to it, saying[1]: "This was an oral agreement "for value, and accordingly, on the making thereof, Peter, the "vendor, became a constructive trustee of his equitable rever-"sionary interest in the trust funds for the appellant. No "writing to achieve that result was necessary, for an agreement "of sale and purchase of an equitable interest in personalty "(other than chattels real) may be made orally, and section 53 "has no application to a trust arising by construction of law." The Court of Appeal did not accept Upjohn J.'s conclusion as to the effect of subsection (2) but did not find it necessary to express a concluded opinion as to the effect of section 53.

Before your Lordships Mr. Wilberforce was prepared to agree that on the making of the oral agreement Peter became a constructive trustee of his equitable reversionary interest in the settled funds for the appellant, but he submitted that nonetheless section 53 (1) (*c*) applied and accordingly Peter could not assign that equitable interest to the appellant except by a disposition in writing. My Lords, with that I agree, but it does not follow that the transfer was a conveyance of that equitable interest on which ad valorem stamp duty was payable under the Stamp Act, 1891. It might well be that there has been no document transferring the equitable interest. The appellant may have been content to rely on getting in the legal interest by the transfer and on the fact that it would be impossible for Peter to put forward successfully a claim to an equitable interest in the settled shares once the consideration shares had been transferred to him or his nominees by the appellant.

In the Court of Appeal Mr. Wilberforce argued that ad valorem duty was payable on the transfer, since immediately before the execution of the transfer Peter's equitable reversionary interest remained in him, and since the transfer vested in the appellant the full legal and beneficial title to the settled shares, the transfer must have operated both to assign to the appellant Peter's reversionary interest and also the legal estate. The Court of Appeal did not accept this argument as they could see no answer to the objection that Peter was not a conveying party and his equitable reversionary interest was never vested in the transferors.

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[1] [1958] Ch. 383, 390; [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252.

Mr. Wilberforce argued alternatively that the transfer, read in the light of the contemporary transfer of the consideration shares to Peter's nominees, and of the deed of release, was in truth nothing other than the completion and the contemplated method of completion of the oral contract and so was a "conveyance or transfer on sale of property" within the meaning of section 54 of, and Schedule I to, the Stamp Act, 1891. This alternative argument the Court of Appeal accepted, saying[2]: "The distinction between the two alternative presentations of "the Crown's case may be a fine one, but it is real. It is of the "essence of the former alternative that the transfer operated "to convey two separate and distinct 'properties,' viz., the legal "estate and Peter's reversionary equitable interest, the Crown "claiming duty in respect of each 'conveyance.' Though the "vendor under the contract need not be a conveying party, "the latter must, as we conceive, be in a position to convey the "property alleged to pass. The second alternative treats the "three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were "thus enabled and entitled to transfer to Mrs. Oughtred (as the "transfer on the face of it purports to do) the shares themselves "with all rights and benefits attached thereto."

My Lords, the distinction is too fine for me. The Stamp Act, 1891, imposes stamp duty on documents, not transactions. The transfer does not attract ad valorem duty unless, to use the language of section 54 of the Act, it is an "instrument . . . "whereby any property, or any estate or interest in any property, "upon the sale thereof is transferred to or vested in a purchaser." The words "upon the sale thereof" must, in relation to this case, mean "on the sale of Peter's equitable interest." It is, as the Court of Appeal recognise, impossible to say that the transfer had the effect of transferring the equitable interest since the transferors never had that interest to transfer, nor, in my opinion, can it be said that by the transfer Peter's equitable interest was vested in the appellant. The appellant as a result of what was done on June 26 was, as the release recognised, absolutely entitled to the settled shares, but that was not because the equitable interest was transferred to or vested in her by the transfer but because Peter, having become a constructive trustee for her of his equitable interest, could not, after his nominees had received the consideration shares, as they did on June 26, 1956, dispute the appellant's title to the settled shares.

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[2] [1958] Ch. 678, 690; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443.

I, too, would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, I have had the advantage of reading the opinion which will be delivered by my noble and learned friend, Lord Jenkins. I agree with it and have nothing to add.

LORD DENNING. My Lords, stripped of all trimmings, the case is simply this: The trustees of a settlement held the legal title in 200,000 shares in trust for Mrs. Oughtred for life, and after her death for her son Peter. Mrs. Oughtred also owned 72,700 shares which were her very own. On June 18, 1956, Peter and his mother agreed by word of mouth that they would, on June 26, 1956, effect an exchange: he would make over to her his reversionary interest in the 200,000 shares, and she in exchange would make over to him the entire interest in the 72,700 shares. On June 26, 1956, the exchange was implemented in this way: (i) By a simple transfer Mrs. Oughtred transferred her 72,700 shares direct to Peter, or rather to nominees for Peter. It was said to be "in consideration of 10s." (ii) Peter did not transfer his reversionary interest in the 200,000 shares direct to his mother, but he authorised the trustees of the settlement to transfer the 200,000 shares to her *to the intent that her life interest should be enlarged into absolute ownership of them*: The authority so given by Peter was implicit in the recitals of a deed of release executed by himself and his mother, which was said to be "in consideration of "the premises and of the transfer so to be made as aforesaid." (iii) By a simple transfer the trustees transferred the 200,000 shares to Mrs. Oughtred. It was said to be "in consideration "of 10s." There is no doubt that the transfer was intended to, and did, vest in Mrs. Oughtred the absolute ownership of the 200,000 shares both in law and in equity. No interest was left in Peter or anyone else. His reversionary interest was squeezed out. The trustees would not have dreamed of executing this transfer unless Peter had authorised them to do it.

Was this transfer "a conveyance or transfer on sale, of any "property" such as to attract stamp duty on the value of the consideration? I have no doubt it was. Peter had agreed to sell his reversionary interest in the 200,000 shares to his mother for a stated consideration (the 72,700 shares). He did not convey this reversionary interest direct to her, nor did he convey it to the trustees of the settlement. But he authorised the trustees to convey it to her—not in the shape of a reversionary interest as such—but by way of enlarging her life interest into absolute ownership. It is clear to me that, by the transfer so made by his authority, she acquired his reversionary interest as effectively as if he had conveyed it direct to her. And that is quite enough to attract stamp duty. In my opinion, every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration. It is not necessary for the instrument of implementation to be between the same parties as the agreement for sale, nor for it to relate to the selfsame property as the agreement for sale. Suffice it that the instrument is the means by which the parties choose to implement the bargain they have made. It is then a "conveyance or transfer "on sale" of any property—which I take to mean a conveyance or transfer consequent upon the sale of the property and in implementation of it. Such is, I think, clearly borne out by *Attorney-General* v. *Brown*,[3] and by the illustrations given in the course of the argument. Thus, when an equitable owner of shares (registered in the name of a nominee) agrees to sell them to a purchaser, and it is implemented by a transfer by the nominee to the purchaser, the transfer is a conveyance upon sale of any property—although, of course, the parties to the agreement are different from the parties to the transfer. And when two people are equitable co-owners of shares—and one of them agrees to sell his interest to the other—and it is implemented by a transfer of the shares by the trustees (with the authority of the one) to the other, the transfer is a conveyance upon sale of any property—although, of course, the property which is transferred is different from the property in the agreement.

I do not think it necessary to embark upon a disquisition on constructive trusts: because I take the view that, even if the oral agreement of June 18, 1956, was effective to transfer Peter's reversionary interest to his mother, nevertheless, when that oral agreement was subsequently implemented by the transfer, then the transfer became liable to stamp duty. But I may say that I do not think the oral agreement was effective to transfer Peter's reversionary interest to his mother. I should have thought that the wording of section 53 (1) (*c*) of the Law of Property Act, 1925, clearly made a writing necessary to effect a transfer: and section 53 (2) does not do away with that necessity.

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[3] (1849) 3 Ex. 662.

For these reasons, which are in substance the same as those given by the Master of the Rolls, I would dismiss this appeal.

LORD JENKINS. My Lords, the question in this case is whether a transfer under seal dated June 26, 1956, whereby the trustees of the settlement hereinafter mentioned transferred to the appellant, Mrs. Phyllis Brown Oughtred, 100,000 ordinary and 100,000 preference shares of 10s. each in a company called William Jackson & Son Ltd., attracted ad valorem stamp duty as a conveyance or transfer on sale within the meaning of the head of charge " conveyance or transfer on sale, of any property " in Schedule I to the Stamp Act, 1891, or was liable only to the fixed duty of 10s. as a " conveyance or transfer of any kind not hereinbefore " described."

The matter came before Upjohn J. on an appeal by way of case stated under section 13 of the Act of 1891 at the request of the appellant by the Commissioners of Inland Revenue, who had assessed the stamp duty chargeable on the transfer in question at £663 10s. made up of £663 ad valorem transfer on sale duty together with the fixed duty of 10s.

Upjohn J. by an order dated December 3, 1957, allowed the appeal, stated the opinion of the court to be that the transfer in question was not chargeable with ad valorem duty, declared that it was chargeable with the fixed duty of 10s. only, and ordered the £663 ad valorem duty paid on the transfer to be repaid.

The commissioners appealed to the Court of Appeal, and by an order of that court (the Master of the Rolls and Morris and Ormerod L.JJ.) dated May 15, 1958, the appeal was allowed, the transfer in question was held to be chargeable with the ad valorem duty of £663 but not with the fixed duty of 10s., and the present appellant was ordered to repay to the commissioners the sum of £662 10s., being the amount of the ad valorem duty held to be payable, less the fixed duty of 10s. held not to be payable.

From that order the appellant now appeals to your Lordships' House.

The facts leading up to the execution of the disputed transfer are fully set out in the stated case and I need not repeat them at length.

Immediately before the making of the oral agreement to which I am about to refer, the shares later transferred by the disputed transfer (which I will call " the settled shares ") were under and by virtue of a settlement dated January 1, 1924, a deed of appointment dated June 18, 1956, and made by the appellant, and a deed of release also made by the appellant and dated June 18, 1956, and in the events which had happened, held by the trustees of the settlement in trust for the appellant for life with remainder to her only child, Peter Bentham Oughtred (whom I will call "Peter") absolutely.

By an oral agreement made on June 18, 1956, between the appellant and Peter it was agreed that Peter would, on June 26, 1956, exchange his interest under the settlement and the abovementioned deed of appointment and deed of release for 28,510 preference shares and 44,190 ordinary shares in William Jackson & Son Ltd. then owned by the appellant (which I will call "the "free shares") to the intent that the life interest of the appellant in the trust fund (which consisted wholly of the settled shares) should be enlarged into absolute ownership thereof.

The oral agreement was followed by the execution of three documents, all dated June 26, 1956, namely: (1) a deed of release (which I will call "the release") made between the appellant of the first part, Peter of the second part, and the trustees of the settlement of the third part, which appears in fact to have been executed only by the appellant and Peter. (2) A transfer by the appellant of the free shares to nominees for Peter, expressed to be made in consideration of 10s. (3) The disputed transfer, likewise expressed to be made in consideration of 10s.

The release, after recital of the facts to which I have already referred down to and including the oral agreement, the terms of which are fully stated in recital (F), continued in the same recital as follows: "(F) . . . The trust fund which now consists "of [the settled shares] is accordingly now held by the trustees "in trust for [the appellant] absolutely as the trustees hereby "acknowledge and it is intended that the same shall forthwith "be transferred to [the appellant] or as she shall direct."

After a further recital (G) to the effect that the appellant and Peter, being satisfied with all matters and things relating to the execution of the trusts of the settlement, had agreed to make the release thereinafter contained, the release by its operative part was expressed to witness that "in consideration of the "premises and of the transfer to be made as aforesaid" the appellant and Peter—to put it shortly—gave the trustees a general release in respect of their trusteeship of the settlement. The transfer of the free shares and the disputed transfer were common form share transfers, the terms of which call for no special comment.

As to the order in which the three documents of June 26, 1956, were executed, it seems clear from the terms of recital (F) and from the phrase " and of the transfer to be made as aforesaid " in the operative part of the release, that this document must have been executed before the disputed transfer, but there is no means of telling whether the execution of the transfer of the free shares preceded or followed the execution of the release or, in the latter case, whether it preceded or followed the execution of the disputed transfer. In my view, nothing turns on this, inasmuch as the three documents were interdependent parts of the same transaction, all executed on the same day. I am, however, prepared to assume in the appellant's favour that the transfer of the free shares to Peter preceded the transfer of the settled shares to the appellant, so that when the transfer of the settled shares was executed the appellant had already performed her part of the bargain.

Ad valorem duty was not claimed on the release or on the transfer of the free shares, but only on the disputed transfer.

The provisions of the Stamp Act, 1891, directly relevant to the claim are these:

Section 1 (which contains the charge of stamp duties) provides that the stamp duties " upon the several instruments specified in " Schedule I to this Act shall be the several duties in the said " Schedule specified . . ."

Section 54 provides as follows: " For the purposes of this Act " the expression ' conveyance on sale ' includes every instru- " ment . . . whereby any property, or any estate or interest in " any property, upon the sale thereof is transferred to or vested " in a purchaser, or any other person on his behalf or by his " direction."

Schedule I imposes under the head of charge " conveyance or " transfer on sale, of any property " (except as therein mentioned) ad valorem duty upon " the amount or value of the consideration " for the sale "; and under the head of charge " conveyance or " transfer of any kind not hereinbefore described " a fixed duty of 10s.

Reference should also be made to section 53 of the Law of Property Act, 1925, which (so far as material for the present purpose) provides as follows: " (1) Subject to the provisions " hereinafter contained with respect to the creation of interests " in land by parol . . . (*c*) a disposition of an equitable interest " or trust subsisting at the time of the disposition must be in "writing signed by the person disposing of the same, or by his "agent thereunto lawfully authorised in writing or by will. (2) "This section does not affect the creation or operation of resulting, implied or constructive trusts."

The question, then, is whether upon the true construction of section 54 of the Act of 1891, and having regard to the terms and effect of the oral agreement and the nature of the interests with respect to which that agreement was made, the disputed transfer was an instrument whereby property in the shape of the settled shares or any estate or interest in that property was transferred "upon the sale thereof" to a purchaser in the person of the appellant.

To revert to the terms of the oral agreement, it was made on June 18, 1956, and provided that on a fixed future date, namely, June 26, 1956, Peter should exchange his interest under the settlement (that is, his absolute interest in the settled shares subject to the appellant's life interest therein) for the free shares belonging to the appellant to the intent that the life interest of the appellant in the trust fund (that is, in the settled shares) should be enlarged into absolute ownership thereof. The effect of the agreement, according to the expressed intention of the parties, thus was that on June 26 the appellant should become absolutely and beneficially entitled in possession to the settled shares discharged from the trusts of the settlement, subject to her obligation to make over to Peter the free shares which formed the consideration for the exchange, or in other words the consideration for the sale to her by Peter of his reversionary interest in the settled shares. By way of corollary to the oral agreement, recital (F) of the release after stating its terms went on to acknowledge that the trust fund, consisting of the settled shares, was accordingly held by the trustees in trust for the appellant absolutely and that it was intended that the same should forthwith be transferred to the appellant or as she should direct.

It is not open to doubt that the oral agreement as above described amounted to an agreement for the sale by Peter, for a purchase consideration consisting of the free shares, of his reversionary interest in the settled shares to the appellant. It is also plain that the parties intended that the sale should have the effect of enlarging the appellant's life interest in the settled shares into absolute ownership thereof and should accordingly be completed on June 26 by an immediate out-and-out transfer of the settled shares by the trustees to the appellant for her own absolute use and benefit, against the satisfaction by her of the consideration due to Peter in the shape of the free shares. The expressed intention of the parties that the appellant's life interest should be enlarged into absolute ownership appears to me to be indistinguishable in its effect from an intention that the appellant's life interest should merge in the reversionary interest, so as to convert that interest into an immediate absolute interest in possession, discharged from the life interest.

Such being the nature of the transaction in connection with which the disputed transfer was executed, the appellant's case is put in this way.

It is said, and said truly, that stamp duty is imposed on instruments, not transactions, and that a transaction of sale carried out without bringing into existence an instrument which has the effect of transferring to, or vesting in the purchaser the property sold attracts no duty. See *per* Lord Esher M.R. in *Inland Revenue Commissioners* v. *G. Angus & Co.*,[4] where he said: "The first thing to be noticed is, that the thing which is "made liable to the duty is an 'instrument.' If a contract of "purchase and sale, or a conveyance by way of purchase and "sale, can be, or is, carried out without an instrument, the case "is not within the section, and no tax is imposed. It is not "the transaction of purchase and sale which is struck at; it is "the instrument whereby the purchase and sale are effected "which is struck at. And if anyone can carry through a pur-"chase and sale without an instrument, then the legislature "have not reached that transaction. The next thing is that it "is not every instrument which may be brought into being in "the course of a transaction of purchase and sale which is struck "at. It is the instrument 'whereby any property upon the sale "'thereof is legally or equitably transferred.' The taxation is "confined to the instrument whereby the property is transferred. "The transfer must be made by the instrument. If a transfer "requires something more than an instrument to carry it "through, then the transaction is not struck at, and the instru-"ment is not struck at because the property is not transferred "by it."

It is said further that in the present case the disputed transfer transferred nothing beyond a bare legal estate, because, in accordance with the well-settled principle applicable to contracts of sale, between contract and completion the appellant became under the oral agreement beneficially entitled in equity to the

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[4] (1889) 23 Q.B.D. 579, 589; 5 T.L.R. 697.

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settled shares, subject to the due satisfaction by her of the purchase consideration, and accordingly the entire beneficial interest in the settled shares had already passed to her at the time of the execution of the disputed transfer, and there was nothing left upon which the disputed transfer could operate except the bare legal estate.

The Commissioners of Inland Revenue seek to meet this argument by reference to section 53 (1) (*c*) of the Law of Property Act, 1925. They contend that as the agreement of June 18, 1956, was an oral agreement it could not, in view of section 53 (1) (*c*), effect a disposition of a subsisting equitable interest or trust, and accordingly that Peter's subsisting equitable interest under the trusts of the settlement, in the shape of his reversionary interest, remained vested in him until the execution of the disputed transfer, which in these circumstances operated as a transfer on sale to the appellant of Peter's reversionary interest and additionally as a transfer not on sale to the appellant of the legal interest in the settled shares. It was by this process of reasoning that the Commissioners arrived at the opinion expressed in the case stated that the disputed transfer attracted both the ad valorem duty exigible on a transfer on sale of the reversionary interest and also the fixed duty of 10s.

This argument is attacked on the appellant's side by reference to subsection (2) of section 53 of the Act of 1925, which excludes the creation or operation of resulting, implied or constructive trusts from the provisions of subsection (1). It is said that inasmuch as the oral agreement was an agreement of sale and purchase it gave rise, on the principle to which I have already adverted, to a constructive trust of the reversionary interest in favour of the appellant subject to performance by her of her obligation to transfer to Peter the free shares forming the consideration for the sale. It is said that this trust, being constructive, was untouched by section 53 (1) (*c*) in view of the exemption afforded by section 53 (2), and that the appellant's primary argument still holds good.

I find it unnecessary to decide whether section 53 (2) has the effect of excluding the present transaction from the operation of section 53 (1) (*c*), for, assuming in the appellant's favour that the oral contract did have the effect in equity of raising a constructive trust of the settled shares for her untouched by section 53 (1) (*c*), I am unable to accept the conclusion that the disputed transfer was prevented from being a transfer of the shares to the appellant on sale because the entire beneficial interest in the settled shares was already vested in the appellant under the constructive trust, and there was accordingly nothing left for the disputed transfer to pass to the appellant except the bare legal estate. The constructive trust in favour of a purchaser which arises on the conclusion of a contract for sale is founded upon the purchaser's right to enforce the contract in proceedings for specific performance. In other words, he is treated in equity as entitled by virtue of the contract to the property which the vendor is bound under the contract to convey to him. This interest under the contract is no doubt a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call. But its existence has never (so far as I know) been held to prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question. Take the simple case of a contract for the sale of land. In such a case a constructive trust in favour of the purchaser arises on the conclusion of the contract for sale, but (so far as I know) it has never been held on this account that a conveyance subsequently executed in performance of the contract is not stampable ad valorem as a transfer on sale. Similarly, in a case like the present one, but uncomplicated by the existence of successive interests, a transfer to a purchaser of the investments comprised in a trust fund could not, in my judgment, be prevented from constituting a transfer on sale for the purposes of stamp duty by reason of the fact that the actual transfer had been preceded by an oral agreement for sale.

In truth, the title secured by a purchaser by means of an actual transfer is different in kind from, and may well be far superior to, the special form of proprietary interest which equity confers on a purchaser in anticipation of such transfer.

This difference is of particular importance in the case of property such as shares in a limited company. Under the contract the purchaser is no doubt entitled in equity as between himself and the vendor to the beneficial interest in the shares, and (subject to due payment of the purchase consideration) to call for a transfer of them from the vendor as trustee for him. But it is only on the execution of the actual transfer that he becomes entitled to be registered as a member, to attend and vote at meetings, to effect transfers on the register, or to receive dividends otherwise than through the vendor as his trustee.

The parties to a transaction of sale and purchase may no doubt choose to let the matter rest in contract. But if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract.

On this part of the case, reference may be made to *Inland Revenue Commissioners* v. *G. Angus & Co.*[5] in which the converse question whether an agreement for sale of property in the shape of goodwill amounted to a conveyance of the property for stamp duty purposes under section 70 of the Stamp Act, 1870, was discussed by the Court of Appeal and answered in the negative; and to the observations of Lord Somervell in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[6]

In the present case recital (F) of the release plainly shows the intention of the parties to the oral contract to have been that the transaction should be completed by the disputed transfer, and this seems to me hardly possible to reconcile with the view that nothing passed under it.

A further argument raised on the appellant's side is to the effect that. in any case, the disputed transfer was not a transfer of the property sold, but was a transfer of the settled shares, whereas the property sold was Peter's reversionary interest. It is said that the disputed transfer was accordingly outside the definition in section 54 of the Act of 1891 because it was not an instrument whereby property or any estate or interest therein was transferred on a sale thereof.

I cannot accept this argument, in considering which I adhere to the assumption made above as to the exclusion of section 53 (1) (*c*) of the Act of 1925. It appears to me that in transferring the settled shares to the appellant the disputed transfer was transferring to her the property then representing the reversionary interest, which under the oral contract had been converted into an immediate interest in possession by virtue of the expressed intention that the sale to the appellant of the reversionary interest should have the effect of enlarging her life interest into absolute ownership, which, as I have said above, appears to me to be indistinguishable from an intention that the appellant's life interest should merge in the absolute reversionary interest.

[5] 23 Q.B.D. 579.

[6] [1958] A.C. 549, 563; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

It is obvious that the sale of an absolute interest in remainder such as this includes the absolute interest in possession in the property comprised in it when it falls into possession. Here, as it seems to me, the reversion was brought into possession in the hands of the appellant by the merger of her life interest, which was necessary if she was to be put in a position to call for an immediate transfer of the settled shares, as it was intended she should be; and accordingly the settled shares as transferred to her actually represented the reversionary interest which she had bought and which had been converted into an immediate interest in possession by the terms of the oral agreement.

One may take by way of illustration the simple case of an agreement for the sale of a reversionary interest in a trust fund subject to a life interest. Suppose in such a case that the life-tenant dies while the matter rests in contract, and that after the life-tenant's death the trustees of the settlement, by the direction of the vendor and purchaser, transfer to the purchaser by appropriate instruments the investments then representing the trust fund. In such a case it would, I should have thought, be impossible to maintain that such instruments did not constitute transfers whereby the investments were transferred to the purchaser on a sale thereof, on the ground that what he purchased was the reversionary interest whereas the property conveyed to him consisted of the investments.

This, it appears to me, would also have been the position here if the appellant had died between June 18 and 26, 1956, and her personal representatives had called for a transfer of the settled shares to implement the oral agreement.

In that event it would, in my view, have been impossible to contend that the transfer of the settled shares was not a transfer of property on a sale thereof within the meaning of section 54. The property sold would have been the reversionary interest and the property transferred would have consisted of the property comprised in the reversionary interest upon its falling into possession.

I do not see why there should be any difference in result between the imaginary case of the reversionary interest falling into possession by the death of the life-tenant and the actual case now before your Lordships, in which the reversionary interest was brought into immediate possession by merger of the life interest.

It can at all events safely be said that the life interest and the reversionary interest either continued in existence as separate

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items of property or they did not. I think the terms of the oral agreement were consistent only with the merger of the life interest and the consequent acceleration of the reversionary interest sold, so as to bring it, and the shares which it comprised, into immediate possession. But, if I am wrong in this, and the life and reversionary interests are to be considered as having remained in existence as separate items of property, then it appears to me that the disputed transfer, made by the direction of both beneficiaries (as shown by the release), and apt as it was to transfer the entire beneficial ownership of the shares at law to the appellant, must be taken to have included two estates or interests in the settled shares, namely, (a) the appellant's life interest and (b) Peter's absolute interest in remainder expectant on the appellant's life interest. If that was the position, then, as it seems to me, the disputed transfer must have operated to transfer to the appellant an estate or interest in property (namely, in the settled shares) consisting of Peter's interest in the shares in remainder expectant on the death of the appellant, which interest had undeniably been sold to the appellant by Peter.

I should next refer to the point taken on the appellant's side that the disputed transfer was made not by the vendor, namely Peter, but by the trustees. In my view there is no substance in this. Where property sold is outstanding in some person other than the vendor, being a trustee for or nominee of the vendor so as to be bound to transfer the property according to the vendor's direction, then in my view a transfer by such person at the direction of the vendor is for the present purpose equivalent to a transfer by the vendor himself. See, for example, *Attorney-General* v. *Brown*,[7] and consider the common case of sub-sales of land in which the vendor conveys by the direction of the original purchaser to the sub-purchaser. It is plain enough from the release in the present case that the disputed transfer was made in effect by the direction of both beneficiaries.

I cannot accept Upjohn J.'s view that the disputed transfer was not stampable ad valorem because it was a transfer not on sale but on the winding up of the trust. This seems to me to beg the question. The fact that the disputed transfer was made on the winding up of the trust does not, in my view, prevent it from being also a transfer on sale.

Let a case be supposed in which trustees hold a net fund in trust for some person who, before the fund is distributed, orally agrees to sell his interest to a purchaser, and upon the conclusion of this agreement the original beneficiary and purchaser from him direct the trustees to transfer the investments representing the fund to the purchaser against a proper release, and the trustees execute the appropriate transfers accordingly. In such a case it appears to me that the resulting transfers would plainly be transfers on sale although they also effected the winding up of the trust.

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[7] 3 Ex. 662.

For the reasons I have endeavoured to state I am of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Moeran, Oughtred & Co., Edgware, for Robinson, Sheffield & Till, Beverley; Solicitor of Inland Revenue.*

F. C.

[HOUSE OF LORDS.]

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CONTRACT AND TRADING CO. (SOUTHERN) LTD. . . . . APPELLANTS;

AND

BARBEY AND OTHERS . . . . . RESPONDENTS.

Exchange Control—Proceedings for debt not payable without Treasury permission—Implied term of contract—Bill of exchange—Payment outside United Kingdom—Holders of bills resident outside scheduled territories—Treasury consent to payment of bills not obtained—Action on bills in England by holders—Right of foreign creditor to payment—Exchange Control Act, 1947 (10 & 11 *Geo.* 6, *c.* 14), *ss.* 5, 33 (1), *proviso, Sch. IV, para.* 4.

Debt—Accrual—Time for payment—Debt subject to Treasury consent—Exchange Control Act, 1947.

By section 5 of the Exchange Control Act, 1947: "Except with "the permission of the Treasury, no person shall do any of the "following things in the United Kingdom, that is to say—(*a*) make "any payment to or for the credit of a person resident outside the "scheduled territories; or (*b*) make any payment to or for the "credit of a person resident in the scheduled territories by order

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* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

"or on behalf of a person resident outside the scheduled territories; "or (*c*) place any sum to the credit of any person resident outside "the scheduled territories. . . ."

By section 33: "(1) It shall be an implied condition in any "contract that, where, by virtue of this Act, the permission or "consent of the Treasury is at the time of the contract required for "the performance of any term thereof, that term shall not be "performed except in so far as the permission or consent is given "or is not required: Provided that this subsection shall not apply "in so far as it is shown to be inconsistent with the intention of "the parties that it should apply, whether by reason of their "having contemplated the performance of that term in despite of "the provisions of this Act or for any other reason. (2) Notwithstanding anything in the Bills of Exchange Act, 1882, neither "the provisions of this Act, nor any condition, whether express or "to be implied having regard to those provisions, that any payment "shall not be made without the permission of the Treasury under "this Act, shall be deemed to prevent any instrument being a bill "of exchange or promissory note. (3) The provisions of Schedule IV "to this Act shall have effect with respect to legal proceedings, "arbitrations, bankruptcy proceedings, the administration of the "estates of deceased persons, the winding up of companies, and "proceedings under deeds of arrangement or trust deeds for behoof "of creditors."

By paragraph 4 (1) of Schedule IV: "In any proceedings in a "prescribed court and in any arbitration proceedings, a claim for "the recovery of any debt shall not be defeated by reason only of "the debt not being payable without the permission of the Treasury "and of that permission not having been given or having been "revoked. . . ."

The plaintiffs were foreigners, who were the holders in due course of bills of exchange for a sum of £8,700, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act, 1947, for the payment of the bills by the defendants to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under R.S.C., Ord. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills. The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in section 33 (1) of the Act of 1947, and that therefore the plaintiffs could not bring themselves within paragraph 4 of Schedule IV to the Act, which was limited to cases where the parties had excluded the implied term:—

Held (Lord Keith of Avonholm dissenting), that paragraph 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligation. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt arising under a bill of exchange was one to which paragraph 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given (post, p. 252).

The Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court, thus discharging the debtor, and the fund itself still remains out of control of the creditor until consent has been obtained (post, pp. 253, 254, 256).

Cummings v. *London Bullion Co. Ltd.* [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383 applied.

Decision of the Court of Appeal [1959] 2 Q.B. 157; [1959] 2 W.L.R. 568; [1959] 2 All E.R. 145 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R. and Pearce L.J.).

This was an appeal from an order of the Court of Appeal dated March 12, 1959, dismissing an appeal by the appellants, Contract and Trading Co. (Southern) Ltd., from an order of McNair J. made in chambers on February 26, 1959, whereby he dismissed an appeal by the appellants from an order of Master Jacobs dated May 23, 1958. In the action the respondents, Edmond Barbey, Georges Lombard, Richard Pictet, Jean Ernest Bonna, Raymond Barbey, Marcel Odier and Thierry Barbey (carrying on business as Lombard, Odier & Cie.) were plaintiffs and the appellants were defendants. Leave to appeal to the House of Lords was granted by the Court of Appeal on March 12, 1959.

The facts were not in dispute. The respondents carried on business and were resident at Geneva in Switzerland, a country not within the scheduled territories as defined by the Exchange Control Act, 1947. As holders in due course of three bills of exchange for a total sum of £8,700, of which the appellants were acceptors and which were dishonoured on presentation, they brought the action out of which this appeal arose against the appellants in the Queen's Bench Division, claiming payment of the sum. On their application under R.S.C., Ord. 14, r. 1, to sign final judgment, the appellants sought leave to defend on the sole ground that the Act afforded them a good defence to the action. The drawer of the bills at the date of drawing them, and at all subsequent times, was resident in France, which was also outside the scheduled territories. Treasury permission for payment of the sum by the appellants to, or for the credit of, the respondents had not been given either at the date of presentation of the bills or at the date of the issue of the writ in the action.

Patrick O'Connor and *Raymond Kidwell* for the appellant company. On the true construction of the Exchange Control Act, 1947, and in particular section 33 (1), the bills of exchange which are the subject-matter of this action are not due and payable. The claim is not actionable unless and until Treasury permission is granted, and, accordingly, the writ is premature. If the condition implied by section 33 (1), which applies to the acceptor of a bill of exchange, be written into the contract, the effect is to produce a promise to pay on the due date or on the date when Treasury permission is given, whichever is the later, so that these bills become due and actionable on that date and not before. The effect of section 33 (1) is to imply this term in any contract which comes within the Act. Since it is thus implied that payment is not to be made until Treasury permission is granted, proceedings cannot be brought until then. The subsection applies where " the permission or consent of the Treasury " is at the time of the contract required for the performance of " any term thereof." That excludes contracts made before the Act came into force and contracts made between persons both of whom are at the time resident in Great Britain. Another class of contracts is excluded by the proviso. In other cases the Act precludes the idea of the money being owed before Treasury consent is given.

If the appellants were wrong on this main point, the question arises of paying the money into court and leaving the respondents to get it out if they can, but the appellants' main contention avoids this difficulty of the money getting into court and never reaching the persons for whom it is intended. The views expressed in *Cummings* v. *London Bullion Co. Ltd.*[1] were obiter and are not binding. The relevant section itself is in plain language. It is proper to consider it before going to Schedule IV, which contains nothing to cut down that plain language. Schedule IV has ample scope in the case of the many people who have emigrated to Canada or decided to spend their old age on the Mediterranean. If this money is paid into court it cannot be assumed that it will reach the respondents, because there is nothing in the Act to show how the Treasury will consider the matter. Further, nothing in the Act enables a debtor to pay money into court in satisfaction of a debt save in proceedings which the creditor has initiated; if such proceedings are begun the debtor will be put to expense by way of costs or otherwise.

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[1] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.

Raymond Kidwell following. If section 33 stood alone the appellants would be in a very strong position. The strength of the case against them lies in paragraph 4 of Schedule IV. To give a proper meaning to them a construction should be adopted which gives a meaningful effect to both. It is possible for persons to contract so as expressly to exclude section 33 (1). In such a case there is scope for paragraph 4 to operate and the money would be paid into court. In such a case the parties would not be committing any illegality. The two provisions can be made meaningful within the confines of perfect propriety. The scheme of the Act deals, not with frustration, but with payment: see sections 5 and 6. This contract was not illegal at its inception because, by the time payment was due, Treasury permission might have been granted.

Norman Tapp for the respondents. On the true construction of the Act and, in particular, of paragraph 4 of Schedule IV, the appellants cannot rely on the allegation of absence of Treasury permission by way of defence to this action. When they are deprived of that allegation they have no defence to the respondents' claim. There is no inconsistency between paragraph 4 and section 33 (1). The section deals with contracts falling within the Act for which Treasury permission is required—not only cases where there is to be a payment of money, but also cases falling within Part III of the Act, dealing with the issue and transfer of securities, and Part IV dealing with the import and export of goods.

Take the case of an Englishman resident in England and a Frenchman resident in Paris making a contract. It would clearly be a breach of the Act for the former to make payment to the latter without Treasury permission. But it might be that the Englishman was buying perishable goods and the Frenchman might be wanting payment before dispatch and might make it a term that payment should be on March 1 and dispatch on March 2. In such a contract it would be manifest that it was meant that he should have the money before parting with the goods and also that the parties were not trying to get round the Act. The whole basis of the contract would disappear if the obligation to make payment were deferred but the obligation to dispatch the goods remained.

Such debts as these come within paragraph 4 irrespective of whether the contract falls within the proviso to section 33 (1). Only illegal contracts will fall to the ground.

Paragraph 4 is in a Schedule headed "legal proceedings, "etc.," and is introduced by section 33 (3). The Schedule deals not with the substantive rights of the parties but with the situation where legal proceedings are on foot. Paragraph 4 raises what is tantamount to an estoppel precluding the defendants from relying on certain facts.

The bills of exchange sued on became payable on service of the writ in this action. The debtor's obligation is still to pay, and once the writ is issued the money can be paid into court. Under R.S.C., Ord. 22, r. 2, it is for the creditor to take steps to obtain payment out of money paid into court. By payment into court the debtor has performed his contract. Section 33 postpones payment to the creditor but does not remove the obligation on the debtor to pay. See also paragraphs 1, 2 and 5 of Schedule IV and R.S.C., Ord. 42, r. 1 (2) and (3), and Ord. 22, rr. 1 and 22.

The Court of Appeal was right in holding that the passages in *Cummings* v. *London Bullion Co. Ltd.*[2] on which it relied were binding on it. Those passages on the effect of section 33 and paragraph 4 were right. They represented the correct approach to the problem and were in harmony with the whole scheme of the Act.

Patrick O'Connor in reply. In Schedule IV the word "debt" means a sum due for payment, but in section 33 the sums referred to are not due and so are not "debts" until Treasury permission has been granted. By reason of the implied term, this contract is not to be performed until Treasury permission has been given. It is performance with which the courts are concerned. Section 33 (1) defines performance in plain language. There is no machinery by which money can be paid into court unless there is an action, and here there is no cause of action. At the time this contract was made it was well known to both parties that Treasury permission was required for payment. See also the note to paragraph 4 in Halsbury's Statutes, vol. XVI, p. 608.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, this appeal raises a short but by no means easy question upon the meaning and effect of certain provisions of the Exchange Control Act, 1947.

[2] [1952] 1 K.B. 327, 334–336.

The facts are not in dispute. The respondents carry on business and are resident at Geneva in Switzerland, a country not within the scheduled territories as defined by the Act that I have mentioned. As holders in due course of three bills of exchange for a total sum of £8,700, of which the appellants were acceptors and which were dishonoured on presentation, they brought the action out of which this appeal arises against the appellants in the Queen's Bench Division, claiming payment of the sum of £8,700. Upon their application under R.S.C., Ord. 14, r. 1, to sign final judgment, the appellants sought leave to defend the action upon the ground (the only ground, as I understand, that was open to them) that the Act afforded them a good defence to the action. It is this question which, having been determined adversely to the appellants by the master and the learned judge in chambers and by the Court of Appeal, has now reached your Lordships' House. It has conveniently throughout been treated as a question of law finally to be disposed of upon an interlocutory application, and I see no objection to this course.

The Act, of which the long title is, " An Act to confer powers, " and impose duties and restrictions, in relation to gold, currency, " payments, securities, debts, and the import, export, transfer " and settlement of property, and for purposes connected with " the matters aforesaid," was a far-reaching measure designed for the protection of the national economy. It is with one only of its many aspects that this case is concerned, namely, the making of a payment in the United Kingdom to or for the credit of a person resident outside the scheduled territories, which, as I have already said, do not include Switzerland. For this matter special provision is made by section 5, which falls within Part II of the Act, but there are general provisions covering this and other prohibited transactions to which it will be necessary to refer. The relevant part of section 5 is as follows (I note that per incuriam section 6, not section 5, has been treated in the courts below as the material section, but nothing turns on this). [His Lordship read section 5 and continued:]

It is common ground that Treasury permission for payment of the sum of £8,700 by the appellants to or for the credit of the respondents had not been given, either at the date of presentation of the bills of exchange or at the date of the issue of the writ in the action. Therefore, said the appellants, the bills were not due and payable and no action lay upon them. And this plea they reinforced by reference to section 33 of the Act to which I refer.

That section, which is in Part VI of the Act entitled "Supplemental," provides as follows: [His Lordship read section 33 and continued:] I pause to note that this section shows upon its face that the contractual obligation of payment created by a bill of exchange is a term for the performance of which Treasury permission is required. And I would also observe how attractively simple at this stage is the argument presented by the appellants. Write out, they say, the condition implied by the statute and you get a promise to pay on the due date, or on the date when Treasury permission is given, whichever is the later date. It is on that date and not before it that the bill becomes due and actionable. My Lords, I might, while wondering that the legislature had thought fit to deprive of their apparent rights creditors, whose only fault lay in residence outside the scheduled territories, without making any countervailing provision for their protection, I might, I say, have been compelled to an unwilling acquiescence in this argument if the Act had ended with subsection (2) of section 33. But subsection (3) of the same section and Schedule IV to which it refers, justify and demand a different interpretation to be put upon section 5 read in conjunction with section 33 (1) and (2).

Schedule IV provides by paragraph 1 that the provisions of Part II of the Act shall apply to sums required to be paid by any judgment or order of any court or by any award, as they apply in relation to other sums, with the implication that such sums are not to be paid except with the permission of the Treasury; by paragraph 2 that nothing in the Act shall be construed as preventing the payment by any person of any sum into any court in the United Kingdom, but that the provisions of Part II should apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside the scheduled territories; by paragraph 3 for the making of rules of court in regard to payment into court and other matters. Paragraph 4 is of vital importance. It is as follows: "(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not "be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not "having been given or having been revoked. (2) No court shall "be prescribed for the purpose of this paragraph unless the "Treasury are satisfied that adequate provision has been made "therefor by rules of court for the purposes specified under the "last preceding paragraph" (i.e., inter alia, for payment into court). The High Court of Justice is such a prescribed court. Paragraphs 5 and 6 may also be mentioned, for their provisions, though not directly in point, undoubtedly fit better into the scheme of the Act for which the respondents contend. The former paragraph provides that in any bankruptcy, winding up of any company, or administration of the estate of any deceased person as therein mentioned, a claim for a sum not payable without the permission of the Treasury shall, notwithstanding that the permission has not been given or has been revoked, be admitted as if it had been given and had not been revoked, and paragraph 6 provides that a debt for the payment of which the permission of the Treasury is required shall, if in other respects it complies with the requirements therein mentioned, be allowed to be a good petitioning creditor's debt notwithstanding the said requirement, if and to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account. This tenderness being shown to creditors in the cases to which paragraphs 5 and 6 apply, it might well be thought strange if other creditors resident outside scheduled territories were left without remedy or protection.

I turn, then, to see whether some other meaning cannot be given to the relevant sections. It appears to me, my Lords, that without doing any violence to the language of section 5 and section 33 a meaning can be given to these sections which will harmonise them with the provisions of Schedule IV and make the scheme of the Act consistent and intelligible. I do not doubt that paragraph 4 of Schedule IV has material upon which it can operate even if it does not apply to cases covered by section 33 (1). But this does not conclude the matter. For the language of that paragraph, "In any proceedings . . . a claim for the recovery of "any debt . . . " is apt to include as well an obligation arising under a bill of exchange as any other monetary obligation, and such an obligation can only be excluded if it is held that there is no "debt" until Treasury permission has been given. But that is just what the paragraph, which must be read with section 33 (1), appears to deny. There is a debt but it must not be paid without permission. It does not for that reason cease to be a debt. It may be said, perhaps, that it is a debt unlike any other debt, in that it is not payable until some condition is satisfied. But that is what the statute provides and by the very language of paragraph 4 recognises.

I conclude, therefore, without difficulty, that a debt arising under a bill of exchange is a debt to which paragraph 4 applies,

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and that a claim for its recovery is not to be defeated by the fact that Treasury permission to pay it has not been given. It was a point fairly made by learned counsel for the appellants in their able arguments that there is no provision enabling a debtor in such a case to pay money into court in satisfaction of the debt except in proceedings commenced by his creditor and that, if such proceedings are commenced, he may be mulcted in some costs or at any rate put to some expenditure. This is so, but paragraph 3 and the latter part of paragraph 4 clearly contemplate the payment into court of all debts to which the first part of paragraph 4 applies, and I do not think that a possible gap in the machinery for carrying out the purposes of the Act can alter its plain meaning.

The only previous case in which the construction of this part of the Act has been considered by the courts is *Cummings* v. *London Bullion Co. Ltd.*[1] In that case it was not perhaps necessary for the court to determine the precise question that now arises, but I am happy to find that Somervell L.J. did think fit to consider it and used language with which I am in agreement. "The person," he says,[2] "entitled to the "payment issues a writ. The fact that permission has not been "obtained is not a defence to the action. On the one hand, the "plaintiff can obtain judgment, the money due under the judg-"ment being subject to Part II of the Act and the rules to which "I have referred. The defendant, assuming that he is admitting "liability, apart from the provisions of the Act, can make a "payment into court. The Act is not to be used to enable the "defendant to retain the money in his pocket, but to control its "reaching its destination, namely, the plaintiff." I cannot express more succinctly my own views in regard to the present case. The appeal must, in my opinion, be dismissed with costs.

LORD GODDARD. My Lords, the question argued in this appeal was, to quote from the printed case lodged by the parties jointly, whether the claim of the respondents, as holders of the bills to which section 33 of the Exchange Control Act, 1947, applies, is defeated by reason of the fact that at the date of the issue of the writ Treasury permission for payment had not been granted. Had section 33 consisted only of its first two subsections, in my opinion the appellants' contention might have prevailed. But by subsection (3) the provisions of Schedule IV to the Act are to have effect with respect to legal proceedings brought in respect of contracts to which the section applies, that is, to contracts where, by virtue of the Act, the permission of the Treasury is, at the time of the contract, required for the performance of any term thereof. There is no provision in the Act prohibiting legal proceedings being brought at any time in respect of such contracts. An allegation that the usance of the bills has been extended by the provisions of the Act is setting up a matter of defence. But paragraph 4 of Schedule IV states in terms that in any proceedings in a prescribed court, and the High Court is such a court, a claim for the recovery of a debt shall not be defeated by reason only of the debt not being payable without Treasury permission. It was argued by the appellants that there was no debt due because a condition must be implied that payment was not to be made until permission had been obtained. No debt can be sued for before the time of payment has arrived, and if the appellants' contention was right, it appears to me that no debt due to a person living outside the scheduled territories to which section 33 applies could ever give cause of action. The provisions of paragraph 4 would then appear to me to be meaningless. The schedule contains elaborate provisions for the payment into court of the moneys recovered by action, the proceeds of which cannot be paid to creditors until permission is granted, and expressly deprives the person sued from setting up the defence that the implied condition as to Treasury permission postpones the payment.

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[1] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 385.

[2] [1952] 1 K.B. 327, 334.

That the Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make is also shown, I think, by paragraphs 5 and 6 of the schedule under which these bills could have been admitted to proof had the acceptors become bankrupt, or would have constituted a good petitioning creditor's debt had the debtors committed an available act of bankruptcy.

I am therefore of opinion that the appeal fails.

LORD RADCLIFFE. My Lords, I agree that this appeal must fail. My reason for thinking so is that I regard paragraph 4 (1) of Schedule IV to the Exchange Control Act, 1947, as precluding the only defence which the appellants have raised against the respondents' claim.

This is not to deny that the proposition which the appellants have brought to this House is a plausible one, having regard to the way in which section 33 of the Act is expressed. The Act, of course, deals with a much wider range of operations than just payments of money; but within that more limited range its general object, as expressed in sections 5 and 6, is to forbid sterling being paid to or placed at the disposition of a person not resident within the sterling area unless Treasury consent has been first obtained. Section 33 (which incorporates the provisions of Schedule IV) is part of the scheme for implementing this control. It is not plain to me exactly why section 33 (1) was thought to be needed in this context, nor does it explain itself. I think that probably the main reason for its introduction was to protect the general run of obligee from being met with a defence by his obligor to the effect that a contract involving Treasury consent for its performance was void in its inception for impossibility or illegality. However that may be, it seems clear that the condition imported into contracts by section 33 (1) applies to the promise that the acceptor of a bill of exchange makes to its drawer or holder. If so, say the appellants, our obligation to pay to the present holders on due presentation was subject to the condition that we were not to pay if Treasury consent had not then been given: it had not been given: what then are we being sued for by this writ, since we were not in default at the date when it was issued, and no money was at that date payable by us to the respondents?

I am not sure that, if section 33 (1) stood alone, there would be any logical answer to this dilemma, of which the appellants are entitled to make all that they can. I do not find anything in the judgments of the Court of Appeal in *Cummings* v. *London Bullion Co. Ltd.*[3] which resolves it. But then, section 33 (1) does not stand alone: there are the provisions of Schedule IV with regard to "legal proceedings" to be taken account of, and I think that it is possible to see, when those provisions are attended to, that the Act has a definite plan that governs legal proceedings for all debts affected by a condition about Treasury consent, whether express or implied. Before approaching the provisions, I think that it is useful to recall that section 33 (1) is not so expressed as to alter "the fixed or determinable future "time" of payment of a bill or to postpone that date to another date. What it imports into the contract is that when the due date of payment arrives performance is not to be called for except so far as Treasury consent is not required.

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[3] [1952] 1 K.B. 327.

Schedule IV establishes a scheme for regulating legal proceedings and other legal actions on debts so far as they are affected by the requirements of exchange control. These provisions are not subsidiary to section 33 (1) or other provisions of the Act: they are substantive enactments in their own right. When, therefore, paragraph 4 (1) of this Schedule says: "In any "proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be "defeated by reason only of the debt not being payable without "the permission of the Treasury and of that permission not "having been given or having been revoked," I read the words "any debt" as being as extensive in meaning as they appear to be and not as confined to those debts—and no doubt there can be some—which arise from contracts not touched by section 33 (1). The sub-paragraph confers statutory authority to sue on debts if the only obstacle to their payment is lack of Treasury consent. It cannot be denied that there are debts owing on these bills, even though payment to the then holder could not be demanded at the date of the writ. If so, there is nothing in law or statute to prevent the holders presenting them for payment or starting legal proceedings upon their not being honoured. Then paragraph 4 (1) comes into play and expressly deprives the debtor of any ground of defence based upon Treasury consent being required and not forthcoming, which would otherwise protect him if section 33 (1) stood alone without Schedule IV.

Such a liberty conceded to the creditor would, indeed, be a very odd result but for the other provisions of this schedule, since the judgment would give him an independent right to payment of sterling which it is the purpose of the Act to allow only with consent. But this is all taken care of by paragraphs 1 to 3 of the same schedule. Judgments for payment of money are subjected to similar conditions requiring Treasury consent before payment: in effect, the hand of control is shifted from the contract to the right arising under the judgment. Moneys due under judgments or orders can be paid into court, thus discharging the debtor, and the fund itself still remains out of the control of the creditor until consent has been obtained. All this explains why it is only in a "prescribed court," that is to say, a court which is found to have made satisfactory rules for payment of judgment sums into its care under Treasury control, that the defence which would otherwise arise under section 33 (1) is denied to the debtor.

My Lords, I think that this conclusion is in accordance with the general purpose and scheme of the Exchange Control Act, and I do not regret it. I do feel, however, that the scheme, as so interpreted, has this unsatisfactory feature that the acceptor of a bill in the position of the appellants is left in a singularly helpless position if he can obtain Treasury permission neither to pay his creditor nor to transfer the sterling to a blocked account. There is nothing that he can do except await the issue of a writ against him and submit to judgment. Happily, with the general relaxation of exchange control on current account transactions, difficulties of this kind may by now be of no more than historical interest.

Lord Cohen. My Lords, I agree that this appeal must fail.

Lord Keith of Avonholm. My Lords, this case is concerned with the payment of three bills of exchange accepted by the appellants and held by the respondents as holders in due course. These were dishonoured on presentation at the due dates. The respondents by specially indorsed writ have claimed payment of the total amount of these bills, namely, £8,700. The respondents are persons resident outside the scheduled territories as defined by the Exchange Control Act, 1947. The drawer of the bills at the date of drawing the bills, and at all subsequent times, was resident in France, which is also outside the scheduled territories as so defined. The question arises of the right of the respondents now to demand payment.

This requires some consideration of the provisions of the Exchange Control Act with regard to payment of debts to persons outside the scheduled territories. In this matter various situations may call for consideration under the Act. I find it sufficient to refer only to two. There is first a contract involving payment of a debt in which debtor and creditor at the date of making the contract are resident in the United Kingdom, but at the time of performance the creditor is resident outside the scheduled territories. In such case, the permission of the Treasury for payment is required under section 5 of the Act. There is, secondly, the case where the creditor is resident outside the scheduled territories at the time of the making of the contract and remains so resident at the time of performance. This case comes under section 33 (1) of the Act. Other cases may be envisaged owing to changes of residence of debtor, or creditor, or both, but these need not be considered. The present case comes within the terms of section 33 (1).

I understand that the view that commends itself to your Lordships is that for all practical purposes no difference in result arises under the Act in these two cases. I would willingly accept this view, if I could see my way to fit it into the framework of the statute. The view commends itself by its simplicity, but I am unable to convince myself that this is the intention of the statute.

I can see good reasons for a distinction. Where there was no impediment to the performance of the contract at the time it was made there is no reason why the debtor should be advantaged, when the time of payment comes, by keeping the money in his pocket and the creditor possibly disadvantaged. Accordingly, under Schedule IV provision is made for the money being paid into court. The creditor cannot get it without the permission of the Treasury, but at any rate he knows it is there waiting for him if and when consent is given. In the other case, the parties know when they make their contract that it cannot be performed as things are, without Treasury consent. It would seem perfectly reasonable that Parliament should say in that case to the creditor: "You must wait till the Treasury gives consent before you can "enforce any payment by your debtor." That, it seems to me, is exactly what the statute has done. It may be that section 33 (1) was introduced also to prevent the contract falling for invalidity. But, if so, that is no reason for supposing that the creditor was being given all the facilities and advantages conferred by the statute on creditors in other cases.

I accordingly examine very briefly the material provisions of the statute. Section 33 is a general section dealing, I think, with a number of matters not necessarily interrelated. Subsection (1) is a provision affecting contracts generally, not merely contracts for payment of money. It plainly enacts that, by the fiction of an implied condition, a term of a contract "shall not be "performed except in so far as the permission or consent is "given or is not required." If, as I understand, payment into court under Schedule IV, in contracts for payment other than those falling under subsection (1) of section 33, is regarded as performance, then in cases coming under the subsection no such performance can, I should have thought, be demanded, on the plain words of the subsection. I find this view reinforced by the words of subsection (2) of section 33, which I set out at length: "Notwithstanding anything in the Bills of Exchange Act, "1882, neither the provisions of this Act, nor any condition, "whether express or to be implied having regard to those pro-"visions, that any payment shall not be made without the

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Lord Keith of Avonholm.

"permission of the Treasury under this Act, shall be deemed "to prevent any instrument being a bill of exchange or promissory "note." I take this to mean that the parties might attach an express condition to acceptance of a bill of exchange by which the due date of the bill is made a date certain, or the date when Treasury consent to payment is given, whichever is the later. The subsection applies likewise to an implied condition and such an implied condition is introduced by subsection (1).

On this construction of the statute I find no difficulty in the provisions of Schedule IV. There can be no maintainable proceedings for recovery of a debt if the debt is not yet due and, accordingly, paragraph 4 (1) does not apply. The language used is fully apt to cover cases other than those falling under section 33 (1). I attach some importance to the words "shall not be "defeated by reason *only* of the debt not being payable without "the permission of the Treasury," etc. These are apt words for a case coming under section 5, but not for a case under section 33 (1). Paragraph 5 (1) of the Schedule would, I think, apply as for ranking of a contingent debt. The paragraph does not require payment of the debt so ranked and the effect, I take it, is to compel the receiver or other administrator to conserve enough estate to meet the debt as ranked when Treasury permission is given. Paragraph 6 would not apply to the debt in suit here, for the reason that, in my view, it does not fall to be satisfied by payment into court, and no arrangement has been made for payment to a blocked account. I regard the words "if and to the "extent that the debt can be satisfied either by a payment into "court or by a payment to a blocked account" as significant. They indicate that there are some debts that cannot, under the intent of the Act, be satisfied by the expedient of the creditor taking proceedings that will result in the sum claimed being paid into court. If this is not one such, I am unable to see what debts are covered by these words.

For these reasons I would allow the appeal.

Appeal dismissed.

Solicitors: *Lipton & Jefferies; Markby, Stewart & Wadesons.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1959
May 26, 27, 28;
June 1;
July 6.

PYX GRANITE CO. LTD. . . . . APPELLANTS;

AND

MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS . . . RESPONDENTS.

Town and Country Planning—Development—"Authorised by Act"—Private Act enacting that heads of agreement between parties "are "hereby confirmed and made binding" on parties—Whether provisions binding as a contract or as a statute—Whether permission required — Quarrying — Permission granted subject to conditions imposed by Minister — Whether conditions related to permitted development valid without provision for compensation — Malvern Hills Act, 1924 (14 *&* 15 *Geo.* 5, *c.* xxxvi), *s.* 54, *Sch.* 4—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14, 15, 17, 26, 27 — *Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I, Class XII.*

Town and Country Planning—Development—Conditions—Validity.

Practice and Procedure — Declaratory judgment — Town and Country Planning — Development — Declaration — Whether jurisdiction to grant declarations ousted by statute—Town and Country Planning Act, 1947, *ss.* 14, 15, 17.

Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.

Crown Practice—Certiorari—Inferior tribunal—Minister—Town and Country Planning—Development—Validity of conditions—Whether certiorari will lie—Town and Country Planning Act, 1947, *s.* 14.

A private Act of Parliament, the Malvern Hills Act, 1924, promoted to preserve the amenities of the hills against depredations by quarrying, provided by section 54[1] that "for the protection" of the appellant company (which carried on extensive quarrying operations in the area affected by the Act, both on their own freehold and over licensed land) "the following provisions shall unless "otherwise agreed in writing between the company and the Con-"servators and the Malvern Council have effect (that is to say):— "The heads of agreement as set forth in the Fourth Schedule to "this Act are hereby confirmed and made binding" on the parties "and the provisions of this Act shall only apply to and affect "the undertaking property or rights of the company subject to the "provisions of the said heads of agreement."

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* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD OAKSEY, LORD KEITH OF AVONHOLM and LORD JENKINS.

[1] Malvern Hills Act, 1924, s. 54: "For the protection of the Pyx "Granite Company Limited (in this "section referred to as 'the com- "'pany') the following provisions "shall unless otherwise agreed in "writing between the company and "the Conservators and the Malvern "Council have effect (that is to say): "The heads of agreement as set forth "in the Fourth Schedule to this Act "are hereby confirmed and made "binding on the company and the "Conservators and the Malvern "Council and the provisions of this "Act shall only apply to or affect "the undertaking property or rights "of the company subject to the "provisions of the said heads of "agreement."

Sch. IV, para. 1: "The company's "rights of quarrying to be limited "(outside their freehold property) to "the quarryable area at North "Malvern defined on a plan . . . a "copy of which is to be supplied by "the Conservators to the company."

Paragraph 1 of the Fourth Schedule provided that "the com-"pany's rights of quarrying" were "to be limited (outside their "freehold property) to the quarryable area at North Malvern" defined on a plan therein prescribed.

The heads of agreement were incorporated, with some variation, in a deed executed in December, 1925, after the passing of the Act. Under the deed the company gave up their rights to quarry many acres of the licensed land in return for a promise by the conservators that the company's rights to quarry on their freehold land and on some 23 acres of licensed land should remain undisturbed.

The Town and Country Planning General Development Order, 1950,[2] made under the Town and Country Planning Act, 1947, provides, so far as material (by article 3 (1) read with Class XII of the First Schedule to the Order), that "development authorised "by any local or private Act of Parliament" may be undertaken without permission.

The company claimed declarations that the development which they proposed to carry out on their freehold and licensed land was "authorised" by the Malvern Hills Act, 1924, and that accordingly two ministerial decisions, in 1949 and 1953, refusing them permission in respect of part of their proposed development and granting permission subject to certain conditions in relation to other parts of their operations were of no effect; and, further, that the conditions imposed by the Minister, exercising his powers under section 14 of the Act of 1947,[3] were invalid, as restrictions on the continuance of an existing use which could be imposed only under section 26 of the Act of 1947 with compensation as provided by section 27 of that Act.

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[2] Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), Article 3: "(1) Subject to the sub-"sequent provisions of this Order, "development of any class specified "in the First Schedule to this Order "is permitted by this Order and may "be undertaken upon land to which "this Order applies, without the "permission of the local planning "authority or the Minister . . ."
Sch. I, Pt. I, Class XII: "Develop-"ment authorised by any local or "private Act of Parliament or by any "Order approved by both Houses of "Parliament, being an Act or Order "which designates specifically both "the nature of the development "thereby authorised and the land "upon which it may be carried out."

[3] Town and Country Planning Act, 1947, s. 14: "(1) Subject to "the provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop

The respondents raised preliminary objections that the court had no jurisdiction to grant the declarations asked for, since (a) by the combined effect of sections 15 and 17 of the Act of 1947[3] the decision of the Minister on an application to determine whether permission was required "shall be final" and the only method of determining such a question was that provided by section 17 (1) (whereby a person "may . . . apply" to the local authority to determine it); and (b) the wide discretion conferred by section 14 on the Minister to impose conditions disentitled the company from coming to the court for a declaration that the conditions were invalid:—

"land, that authority may grant "permission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such application the local planning authority "shall have regard to the provisions "of the development plan, so far as "material thereto, and to any other "material considerations. (2) Without prejudice to the generality of the "foregoing subsection, conditions may "be imposed on the grant of permission to develop land thereunder— "(*a*) for regulating the development "or use of any land under the control "of the applicant (whether or not "it is land in respect of which the "application was made) or requiring "the carrying out of works on any "such land, so far as appears to the "local planning authority to be "expedient for the purposes of or "in connection with the development "authorised by the permission; (*b*) "for requiring the removal of any "buildings or works authorised by "the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified "period, and the carrying out of any "works required for the re-instatement of land at the expiration of "that period; and any permission "granted subject to any such condition as is mentioned in paragraph "(*b*) of this subsection is in this Act "referred to as permission granted "for a limited period only."

S. 15: "(1) The Minister may "give directions to any local planning authority . . . requiring that "any application for permission to "develop land, or all such applications of any class specified in the "directions, shall be referred to the "Minister instead of being dealt with "by the local planning authority, "and any such application shall be "so referred accordingly. (2) Where "an application for permission to "develop land is referred to the "Minister under this section, the "provisions of subsections (1) and (2) "of the last foregoing section shall "apply . . . in relation to the determination of the application by the "Minister as they apply in relation "to the determination of such an "application by the local planning "authority: Provided that before "determining any such application "the Minister shall, if either the "applicant or the local planning "authority so desire, afford to each "of them an opportunity of appearing before and being heard by a "person appointed by the Minister "for the purpose. (3) The decision "of the Minister on any application "referred to him under this section "shall be final."

S. 17: "(1) If any person who "proposes to carry out any operations "on land or make any change in "the use of land wishes to have it "determined whether the carrying out "of those operations or the making "of that change in the use of the "land, would constitute or involve "development of the land within the "meaning of this Act, and, if so, "whether an application for permission in respect thereof is required "under this Part of this Act . . . he "may, either as part of an application for such permission, or without "any such application, apply to the

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PYX GRANITE CO. LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT.

Held, (1) that nothing in section 17 or in the Act excluded the jurisdiction of the court to grant declarations; section 17 merely provided an alternative method of having the question determined by the Minister.

Barraclough v. *Brown* [1897] A.C. 615; 13 T.L.R. 527 distinguished.

Decision of McNair J. in *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136; [1957] 2 W.L.R. 627; [1957] 1 All E.R. 825 applied.

Per Viscount Simonds. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis* v. *Yiewsley and West Drayton Urban District Council* (supra), a "fundamental rule" from which I would not for my part sanction any departure.

(2) That by virtue of section 54 of the Malvern Hills Act, 1924, the heads of agreement were given statutory force, and that, accordingly, the company were "authorised" to continue quarrying operations within the limits prescribed, which included the company's freehold land, and did not require permission for carrying out the development in question.

Reg. v. *Midland Railway Co.* (1887) 19 Q.B.D. 540 distinguished.

(3) That, in the circumstances, it was unnecessary to determine the questions whether the Minister could lawfully annex conditions to the permission granted, and whether their legality could be challenged except by certiorari.

Per Lord Goddard. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

Decision of the Court of Appeal [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 reversed.

APPEAL from the Court of Appeal (Lord Denning and Hodson L.J., Morris L.J. dissenting).

"local planning authority to determine that question. (2) The foregoing provisions of this Part of this "Act shall . . . apply in relation to "any application under this section "and to the determination thereof "as they apply in relation to applications for permission to develop land "and to the determination of such "applications: Provided that where "it is decided by the Minister under "any of the said provisions that any "operations or use to which an application under this section relates "would constitute or involve development of the land, or that an application for permission is required as "aforesaid in respect thereof, that "decision shall not be final for the "purposes of any appeal to the court "under the provisions of this Part of "this Act relating to the enforcement "of planning control, in relation to "those operations or that use."

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Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government.

This was an appeal from an order of the Court of Appeal (Lord Denning, Hodson and Morris L.JJ.) dated February 7, 1958, who, by a majority, allowed an appeal by the respondents, the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester, from a judgment of Lloyd-Jacob J. (sitting as an additional judge of the Queen's Bench Division) dated April 16, 1957, and wholly set aside the said judgment.

The questions raised by this appeal were: (*a*) whether the High Court of Justice had jurisdiction to grant the declarations which were made by the judge; (*b*) whether the appellants, the Pyx Granite Co. Ltd., were entitled in law to carry out certain quarrying operations without obtaining planning permission; (*c*) whether certain conditions imposed by such permissions as were granted to the appellants were valid in law.

The facts, in chronological order, were as follows. In 1924 a private and local Act of Parliament, the Malvern Hills Act, 1924, was promoted on a Bill by the Malvern Hills Conservators, a body constituted and incorporated under earlier private Acts, to obtain greater powers to preserve the amenities of a place of great natural beauty. The preamble to the Act stated that "whereas in recent years the amenities of the Malvern Hills "have been seriously interfered with by quarrying operations "and by the erection of buildings sheds machinery and plant "and their operations are being extended in such manner as to "threaten to destroy the value of the Malvern Hills as objects "of public interest" the conservators asked for further powers of "protecting controlling and dealing with" the Hills.

The Bill was opposed on its passage through Parliament by, inter alia, the appellant company, Pyx Granite Co. Ltd., an existing quarry undertaking with extensive vested interests in the area concerned. They were the owners in fee simple at all material times of 11 acres of the land (the "Tank Quarry"), five acres of which have never yet been quarried and contain stone sufficient to last 100 years; and they also had various licences to work other extensive quarryable areas. Negotiations took place during the passage of the Bill with various interested parties, and, by sections 26 and 27 of the Act, Parliament empowered the Minister of Health, on the application of the conservators, to make orders prohibiting quarrying on any particular part of the Hills, but provided that the conservators should pay compensation to the owners affected by such orders.

The particular negotiations between the appellant company, the conservators and the Malvern Council resulted in extremely detailed "heads of agreement" being drawn up and set out in the Fourth Schedule to the Act, and by section 54 of the Act [1] were "hereby confirmed and made binding" on the parties.

The heads of agreement contemplated that a formal agreement would be executed; and after some differences between the parties, which were only resolved after a decision of the Court of Appeal on June 24, 1925, a deed was executed on December 14, 1925, by the Malvern Council, the conservators, and the company, under which the company gave up their right to quarry on a considerable area of land in return for a promise by the conservators that the company's rights to quarry on their freehold property (the Tank Quarry) should not be prejudiced or affected by the deed and that the company should have the right to quarry on some 23 acres of land licensed to them by the council. By clause 3 (a) thereof the company undertook not to "open dig "search for work or get by open quarrying or otherwise any "stone . . . lying and being within or under any lands forming "part of the Malvern Hills as defined in the said Act other than "(1) their existing freehold property (2) the fifth quarry and "(3) the quarryable area" thereafter defined.

On November 17, 1947, before the coming into force of the Town and Country Planning Act, 1947, the company applied to the Malvern Council for permission to develop the land for quarrying purposes. The provisions of the Town and Country Planning, England and Wales Interim Development Order (S.R. & O., 1946, No. 1621), made under the Town and Country Planning Acts, 1932 to 1944, were then in operation; and on January 14, 1948, the Minister of Town and Country Planning "called in" the company's application for decision. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948; and by a letter on September 5, 1949, the Minister granted the company permission to win and work the minimum amount of granite required to ensure safety on the North Quarry part of the licensed lands by removal of a sufficient weight of rock to secure stabilisation of a threatened slip, and to leave a trimmed face at a safe angle of repose, subject to three conditions.

In July, 1952, a public local inquiry was held by the Minister to inquire into the various applications for quarrying in the

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[1] For footnote 1 see p. 260.

Malvern Hills. At the inquiry the appellant company informed the Minister that their quarrying operations were "development" within the meaning of the Act of 1947, which was permitted unconditionally by virtue of section 54 of the Malvern Hills Act, 1924, as "development authorised by any local or private Act "of Parliament . . ." and falling within the provisions of article 3 and Class XII of the First Schedule to the Town and Country Planning General Development Order, 1950[2] (S.I. 1950, No. 728) (which revoked and replaced by identical provisions so far as material the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958)). The company accordingly invited a dismissal of their application by the Minister on the ground that no development permission was required.

By a letter dated September 30, 1953, the Minister stated that he was advised that notwithstanding the provisions of the Malvern Hills Act, 1924, and of the Order of 1950, permission was required by the company for the continuance of the operations in question and that he must deal with the application on its merits. He refused the company permission to win and work granite in respect of parts of the company's freehold land because he wished to preserve the skyline; and he also refused permission to work a spur of the licensed land because it screened the workings. He granted permission to win and work granite in a defined part of the freehold land until June 30, 1966, subject to conditions, which, so far as relevant, were (1) that crushing and screening should only be operated between such hours as might be agreed, and that steps should be taken to control the emission of dust therefrom; (2) that all plant, machinery and foundations should be removed when they were no longer required, and that the site be left in a tidy condition; (3) that notwithstanding the provisions of the Order of 1950, permission should be obtained under the Act of 1947 for the erection of buildings for use in connection with the winning and working of minerals under this permission.

On December 21, 1954, the company issued the writ in the present proceedings, claiming declarations (1) that the winning and working of stone by them in certain lands and quarries at Malvern was development within the meaning of the Town and Country Planning Act, 1947, for which there was unconditional planning permission; (2) that the purported decision of September 5, 1949, by the Minister of Town and Country Planning, and the purported decision dated September 30, 1953, by the Minister of Housing and Local Government, were of no effect and invalid and in no way affected the company's rights to win and work pursuant to the said unconditional permission; (3) alternatively, that certain conditions purported to be imposed by the purported decisions of the Minister were of no effect and invalid; and they also asked for an injunction to restrain the Worcestershire County Council (the second respondents) from acting as the local planning authority on the said decisions.

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[2] For footnote 2 see p. 261.

The respondents claimed by the defence, inter alia, on a preliminary objection, that as the combined effect of sections 15 and 17 of the Town and Country Planning Act, 1947,[3] provided statutory procedure for the determination of any question as to whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which permission would be required, and enacted that any decision of the Minister made on an application under section 17 (1) "shall be final," the court had no jurisdiction to grant the declarations asked for. Secondly, they claimed that the development sought by the company was not "authorised" by the Malvern Hills Act, 1924, and accordingly permission was necessary. Thirdly, they claimed that the discretion conferred on the Minister by section 14 (1) and (2) (*a*) entitled him to impose conditions, and the company was not therefore entitled to declarations in respect of those conditions.

Lloyd-Jacob J., in his judgment on April 16, 1957, held that he had jurisdiction to grant declarations, and granted declarations in favour of the company accordingly.

The respondents appealed, and on February 7, 1958, the Court of Appeal by a majority (Morris L.J. dissenting) allowed the appeal.

The appellants appealed.

J. Ramsay Willis Q.C. and *William Scrivens* for the appellants, Pyx Granite Co. Ltd. The first question is whether the proposed development was authorised by the Malvern Hills Act, 1924. The majority of the Court of Appeal (Lord Denning and Hodson L.J.) thought that it was not so authorised in view of *Reg.* v. *Midland Railway Co.*,[4] but that case was decided on the language of a particular private Act and on certain railway Acts. The words of section 54 of the Act of 1924 are more akin to the language of the Act which was under consideration in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*[5] (distinguished in *Reg.* v. *Midland Railway Co.*[6]), and, accordingly, applying that decision, it is submitted that the heads of agreement have statutory force. It is also to be noted that in the *Midland Railway* case[7] there was an agreement in existence before the private Act was ever passed, but in the present case no concluded agreement had been entered into prior to the Act. If section 54 and the Fourth Schedule had not been included in the Act, a contract in the terms of the heads of agreement in derogation of the provisions of the Act could not have been validly made. Section 54 and the Fourth Schedule were *not* "a simple confirmation" of what the parties had agreed: *per* Wills J. in the *Midland Railway* case.[8] The present case is also distinguishable from *Reg.* v. *Midland Railway Co.*[9] on the ground that section 54 was inserted in the Act expressly for the benefit of the company; no such considerations arise in the "railway" cases, which form a special category.

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[3] For footnote 3 see p. 261.

[4] (1887) 19 Q.B.D. 540.

Whereas by the Act of 1924 Parliament was imposing strict control on the company in order to preserve the amenities of the Malvern Hills, it plainly took the view in enacting section 54 that although the company's activities were to be controlled it was not to be put out of business. The use of the words in that section "unless otherwise agreed" cannot be taken as meaning that the parties could completely abandon the heads of agreement which Parliament had fixed. Compare the language of section 56 (3): "Upon the expiration of the said existing lease to the "Pyx Granite Co. Ltd." in certain lands therein mentioned "the "owner shall not renew that lease"; it is plain that the parties could not by an agreement in writing override the provisions of that subsection. That is an indication of the very limited power in the parties, despite the use of the words in section 54 "unless "otherwise agreed," to depart from the heads of agreement.

Generally, it is submitted that the parties could not *extend* the powers given by the heads of agreement but they could *limit* such powers by agreement. In so far as rights are granted to the conservators, the council and the company, the provisions of the Act are paramount except to the extent that the Act states that any rights granted are confined to one or other of those persons. Lord Denning took too restricted a view of this Act in applying to it the *Midland Railway* case.[10] Morris L.J.'s reasons for distinguishing that case are adopted.[11]

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[5] (1874) L.R. 2 Sc. & D. 347.

[6] 19 Q.B.D. 540.

[7] Ibid.

[8] Ibid. 550.

[9] 19 Q.B.D. 540.

As to the question of "authorisation," it is plain from the heads of agreement taken as a whole that the company were "authorised" to quarry within the limits of the quarryable area as defined in paragraph 1 of the heads of agreement. This comprised, inter alia, the company's freehold land. viz., the Tank Quarry, by virtue of section 5 of the Act of 1924, as being part of the "Malvern Hills." Under the heads of agreement the conservators have acquired an interest in the company's undertaking, including its freehold land, since under paragraph 12 they were given an option to purchase it. The company would not have submitted to these proposals, and Parliament would not have been prepared to accept the inroad which the Act would otherwise have made on the company's activities, unless the company was afforded protection to quarry in the quarryable area and on its freehold land. This was in fact what might be termed a "package deal"; the result was enshrined in section 54 of the Act and the Fourth Schedule. In construing the word "authorised" in Class XII reliance is placed on the discussion on "authorise" in *Evans* v. *E. Hulton & Co. Ltd.*[12] In the present context it comprises not only new development which would be impermissible without the new enactment, but also the countenancing of work which had taken place prior to the passing of the Act. Accordingly, it is submitted, to adopt the words of Morris L.J.,[13] that Parliament "conferred protection on the company, "which protection recognised their existing rights in reference "to their freehold property, and governed and defined their other "rights." Parliament "decreed a settlement which took into "account public interests on the one hand, and private interests "on the other. Though that settlement was negotiated by those "concerned, Parliament then sanctioned it and countenanced it. "As a piece of planning . . . they 'authorised' it. . . . The "development operations of the company after the date of the "passing of the Act of 1924" should be regarded "as having "been done with the recognition, sanction and approval of Parlia"ment, and, accordingly, when planning is being considered, as "having been done with the authority of Parliament."

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[10] 19 Q.B.D. 540.

[11] [1958] 1 Q.B. 554, 585–587.

[12] (1924) 131 L.T. 534, 535.

[13] [1958] 1 Q.B. 554, 588.

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The only other question which arises at this stage of the argument is as to the validity of the conditions imposed by the Minister. Section 14 cannot be considered in isolation, but must be examined along with sections 26 and 27. The three sections form a code in respect of the control of land. The Minister by claiming to impose these conditions under the general power contained in section 14 (1), or, alternatively, under the special power contained in section 14 (2) (*a*), is seeking to deprive as it were by a sidewind the company from obtaining compensation when it removes its buildings at the end of the period during which it is enabled to win and work stone. Lord Denning enunciated the correct principle when he said [14] that the " conditions, " to be valid, must fairly and reasonably relate to the permitted " development." The conditions imposed by the Minister can only be validly made pursuant to section 26, under which compensation becomes payable under the provisions of section 27. The conditions are ultra vires the powers conferred by section 14 (1) and (2) (*a*), for unless a particular condition can be seen clearly to relate to the actual development intended, it cannot be validly imposed under those subsections. The company did not need planning permission to continue the use of buildings and land which was an existing use. Sections 26 and 27 provide a complete code for dealing with authorised uses. This follows from the true construction of section 14 (2) (*a*), for " regulating " the development or use of any land cannot refer to bringing works to an end, nor can the " carrying out " of works refer to bringing works to an end. " Works " in the planning Acts connote the doing of something positive by way of new works (see sections 75, 76, 79 and 86 of the Act of 1947), and, unless there is specific reference to " works " of " demolition," as in section 30 (6), would not include demolition. Unless section 14 (2) (*a*) can be construed in the sense of requiring the removal of buildings at the end of some unspecified period, which it is submitted it cannot, the section, in the circumstances, has no application. If the Minister wished the buildings in question to be removed, his only course was to treat the application for winning and working the stone under section 14 (2) (*b*), and thereupon to invite the local planning authority to apply under section 26 for their demolition at the end of the period for which the winning and working of stone was permitted.

As to the imposition of conditions under section 14, see also the observations of Lord Evershed M.R. in *Fawcett Properties Ltd.* v. *Buckingham County Council.*[15] [Reference was also made to sections 18 (4), 23 and 24 of the Town and Country Planning Act, 1947; Encyclopedia of Planning and Compensation, vol. 1, Part II, p. 1866.]

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[14] [1958] 1 Q.B. 554, 572.

William Scrivens following. As to the conditions relating to crushing and screening, it is plain that the only development authorised is the winning and working of stone, and no crushing and screening occurs until the stone has been worked and won and carried away from the floor of the quarry. It is that chattel which is crushed and screened. No processing of that chattel can be for "the purposes of" winning and working it, nor is there within the meaning of section 14 (2) (*a*) any nexus between the process of winning and working the stone and the times of crushing and screening.

The conditions in question do not operate at all on that which is permitted under section 14 (1); they are not related to limiting the winning and working of the stone. The conditions are much too wide and are ultra vires. Further, the powers conferred on the planning authority by section 14 (2) (*a*) are distinct from those conferred by section 14 (1), but neither subsection confers any right to suppress an independent existing use and thus deprive a developer of a right to compensation under section 27.

As to section 14 (2) (*b*), the requirement of the removal of buildings or the discontinuance of the use of buildings is clearly only referring to existing buildings and an existing use at the date of the application for planning permission, and reinstatement means restoring the land to the state in which it was before the limited permission for development was given. In the present case that subsection can have no application, for the permission granted by the Minister contemplates the erection of buildings for use in connection with the winning and working of stone consequent upon the grant of permission.

G. D. Squibb Q.C., *J. R. Cumming-Bruce* and *Andrew Leggatt* for the respondents, the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester. The first declaration asked for, namely, whether the proposed development is "development" for which the company requires or has permission under the Act of 1947, could have been made under section 17 (1) of the Act. The only question

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[15] [1959] Ch. 543, 559, 560; [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321.

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between the parties on this issue is whether the jurisdiction conferred by section 17 is exclusive or collateral with that of the High Court. It is to be noted that section 17 enables an intending developer to obtain an answer to a hypothetical question. As a general rule the High Court does not concern itself with hypothetical questions but only with live issues between the parties. The section provides a very cheap and untechnical form of procedure, at any rate in the first instance, when application is made to the local planning authority. Further, it is relevant to bear in mind in considering the second limb of section 17 (1) that when the local planning authority is considering a question relating to the interpretation of a document emanating from the Minister, that is, the development order, the scope of the order is entirely a matter to be decided by the Minister. It is not unnatural that, if a question arises in respect of the development order, in the last resort it should be the Minister who answers it. Section 17 enables the subject to obtain a decision from the Minister which is final except for the matters referred to in subsection (2) of that section. The statute has provided the form of procedure to be followed; this is not a common law matter but purely a creature of statute, and, therefore, the remedy provided by the statute must be followed: see *per* Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford.*[16] If it were not for section 17 the subject would carry out any proposed development at his own risk and possibly have an enforcement notice served on him. In all its essential features section 17 is in the same terms as the Act under consideration in *Barraclough* v. *Brown,*[17] in which the House of Lords held that where a statute prescribes a new remedy for rights arising under it the subject is debarred from invoking the jurisdiction of the High Court to have any questions thereunder determined.

Without section 17 the company would have no right of redress; it confers on the subject a right which is otherwise unknown to the law. It is submitted that Hodson L.J.[18] adopted the correct approach to the solution of this question: "Planning "is itself the creature of statute, and Parliament has provided "its own method for the determination of the question here "involved, videlicet, whether planning permission is required." The Minister's decision, in general, is final: see section 15 (3) of the Act of 1947. That is applied in section 17 (2) to proceedings

[16] (1859) 6 C.B.N.S. 336, 356.

[17] [1897] A.C. 615; 13 T.L.R. 527.

[18] [1958] 1 Q.B. 554, 575.

under section 17. Further, development which is permitted in classes other than Class XII of the Order of 1948 (1950) involves pure questions of fact: see, for example, Class VI (3), Class VIII (1) (iii). In Class VI (3) the permitted development is "the "winning and working, on land held or occupied with land used "for the purposes of agriculture, of any minerals reasonably "required for the purposes of that use . . ."; it would seem inappropriate to seek a declaration in the High Court that something was "reasonably required." The fact that some questions arising under the Order are quite unsuitable for determination in the High Court may be a pointer that Parliament did not intend *any* questions arising thereunder to be so determined. Finally, reliance is placed on the observations of Stirling J. in *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*[19] to the effect that the court ought to be slow to grant a remedy where the legislature has provided a cheap and short method of obtaining a decision on the point in question.

The second question is whether the proposed development was "authorised" by the Act of 1924. The appellants have submitted that the development was so "authorised" if that word is construed in the way that it was by Tomlin J. in *Evans* v. *E. Hulton & Co. Ltd.*,[20] that is, in the sense of giving formal approval to, countenancing. But it is submitted that the word "authorised" is used in the Order of 1948 (1950) in the same way as it is used in the Act of 1947: see, for example, section 118 (1), which refers to "authorising or regulating" any development of land. That indicates that in the Act of 1947 "to "authorise" is not the same as "to regulate." It is not sufficient for the appellants' purposes to say that the Act of 1924 merely regulated the company's position. In this context "authorised" means the grant of a specific power to do something: see, for example, section 37 (1) and (3) of the Act of 1947, which concerns the circumstances in which the compulsory acquisition of land may be "authorised."

In considering whether quarrying was "authorised" under the Act of 1924 it is relevant to consider its objects. The general purpose of the Act was to regulate and preserve the Malvern Hills and, if necessary, to do this by restricting or prohibiting quarrying: sections 25 and 26. Thus, the Act envisaged the *prevention* of quarrying and not an increase in quarrying. The object of section 54 was to protect the appellants from the full rigours of the Act. Under it the company was to be left in the same position as it was in before the Act was passed. That was not an authorisation to quarry but a failure to prevent the company from quarrying; the appellants were left out of the Act on condition that they complied with the heads of agreement. The words in section 54 " unless otherwise agreed in writing " enable the appellants to forgo the whole or part of the protection afforded to them, but they do not entitle the parties to substitute an entirely new agreement contrary to the terms of the heads of agreement. The words in that section, " hereby confirmed and " made binding," are important, and are covered by the decision in *Reg.* v. *Midland Railway Co.*[21] If that decision be correct it is wrong in these circumstances to equate sanction with authorisation, as Morris L.J.[22] appears to have done. It is to be observed that head 18 of the heads of agreement contemplated that a formal agreement should be prepared and executed by the parties. This was done by the deed dated December 14, 1925, which thereafter replaced the heads of agreement. This disposes of the appellants' argument on this question that for any " autho- " risation " to be valid it must be found in the Act alone, and not in the Act together with some other document. There is nothing in section 54 which militates against this conclusion; in particular, the concluding words of that section are only stating in different language the opening words of the section, namely, that it is a provision for the *protection* of the appellants.

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[19] [1898] 2 Ch. 331, 345.

[20] 131 L.T. 534, 535.

In any event, it is submitted that the Act of 1924 did not authorise quarrying in the Tank Quarry, that is, on the company's freehold land. It is excluded expressly under head 1 of the heads of agreement, and freehold land is not within the " Malvern " Hills " as defined in section 5 of the Act. The concluding words of section 5 refer to lands which the conservators were authorised to acquire under section 29 of the Act of 1884. The Tank Quarry was not within the Act of 1884 nor the Act of 1924, and the appellants could not have been stopped from quarrying there. Further, it is submitted that in section 5 the words " common or waste " in the phrase " lands common or waste " are used as adjectives and not as nouns. In that event the conservators never had an option over the freehold land, and, accordingly, it never formed part of the Malvern Hills. In section 2 the definition of the words " Revenues of the conser- " vators " shows that the conservators might have property which does not form part of the Malvern Hills, and that further supports the view that the words "common or waste" in this context cut down the definition of "lands." This is also supported by the fact that section 3 incorporates the Lands Clauses Consolidation Act, 1845, which by section 3 of that Act has a definition of "lands" couched in the widest terms. If that definition is incorporated into the Act of 1924, there was no necessity in section 5 to add the words "common or waste" in order to *extend* the meaning of the word "lands," but, rather, they must have been added to *restrict* its meaning.

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[21] 19 Q.B.D. 540, 545.

[22] [1958] 1 Q.B. 554, 587, 588.

The real question is whether the freehold land not being within section 5 has been brought in by section 54. But that section is a section for the protection of the appellants. It is not a provision for extending the powers of the conservators under the Act, but one cutting down their powers in relation to the company. It is unsound to construe section 5 by reference to section 54, for that section is, in effect, a proviso to the Act. Although a proviso may be looked at for the purpose of resolving an ambiguity, it should not be considered for the purpose of giving a different meaning to a substantive provision which is otherwise unambiguous: see *per* Lord Davey in *West Derby Union* v. *Metropolitan Life Assurance Society*.[23] The appellants have contended that the freehold land comes within section 5 because under paragraph 12 of the heads of agreement the conservators have an option to purchase the company's "undertaking." But that option has long ceased to be exercisable, and from the moment that the option lapsed the freehold land ceased to be within section 5 in any event.

The appellants' claim that the conditions imposed by the Minister are invalid is wholly misconceived. In the first place, there is no jurisdiction in the High Court to grant a declaration of that kind. Under the first limb of section 14 (1) of the Act of 1947 the power to impose conditions is unfettered. The only fetter imposed by the second limb of the subsection is that it is incumbent on the planning authority to pay regard to the material provisions of the development plan and to "any other material "considerations." It is only if the planning authority pay regard to any "considerations" which are not "material" that anything done under the subsection can be said to be invalid; but it invalidates all that has been done under the subsection, that is, it invalidates the permission. In those circumstances, if a case arises for querying the validity of a permission granted pursuant to section 14 (1), the proper method is to apply to the High Court for an order of certiorari to bring up and quash the decision and not to seek a declaration. *Rex* v. *Hendon Rural District Council, Ex parte Chorley* [24] is authority for the proposition that the activities of a local planning authority or of the Minister in granting planning permission are sufficiently near to a judicial decision as to be amenable to certiorari. To seek a declaration in these circumstances is quite inappropriate, for if the planning authority has taken into account "considerations" which are not "material," and thus arrived at a decision which is bad in law, it is impossible for the court to say what conditions might have been imposed if only the material considerations had been utilised. This submission is supported by a passage in the judgment of Hodson L.J.,[25] and Roxburgh J.'s implied criticism of it in *Fawcett Properties Ltd.* v. *Buckingham County Council* [26] is not well founded. The word "condition" in section 14 (1) is not used in the Chancery sense, but in the sense of a restriction upon or a cutting down of an otherwise unrestricted permission; it is equivalent to a restriction, qualification, limitation or requirement. The word is not there used as a term of art. This is shown by the fact that, if a condition is not complied with, planning permission is not thereby invalidated, but it merely entails that enforcement proceedings can be taken under section 23 of the Act to ensure compliance.

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[23] [1897] A.C. 647, 657; 13 T.L.R. 536.

The liquor licensing cases, *Reg.* v. *West Riding of Yorkshire County Council* [27]; *Reg.* v. *Bowman* [28]; *Rex* v. *Sussex Confirming Authority, Ex parte Tamplin & Sons Brewery (Brighton) Ltd.*,[29] show that where invalid conditions are attached by justices to the grant of a licence one can bring up and quash the licence as a whole. Similarly, a failure by the planning authority in imposing conditions to comply with the provisions of section 14 (1) enables the subject to invoke certiorari to bring up and quash the *whole* decision, for, as stated above, if the local planning authority have taken into account in imposing conditions immaterial considerations, it is impossible for the court to hold what the decision would have been if only material considerations had been taken into account.

[24] [1933] 2 K.B. 696; 49 T.L.R. 482.

[25] [1958] 1 Q.B. 554, 578, 579.

[26] [1958] 1 W.L.R. 1161, 1167.

[27] [1896] 2 Q.B. 386; 12 T.L.R. 454.

[28] [1898] 1 Q.B. 663; 14 T.L.R. 303.

[29] (1937) 54 T.L.R. 46; [1937] 4 All E.R. 106.

If it be held, contrary to the above, that the grant of a declaration may be an appropriate remedy in these circumstances, then it is submitted that a declaration is only apposite where there was no jurisdiction to grant permission. But in the present case the appellants' only complaint is that the Minister exercised his discretion wrongly, not that he did not have jurisdiction, and, accordingly, it would be wrong for the court to make a declaration: see *Barnard* v. *National Dock Labour Board*.[30] There is nothing in *Vine* v. *National Dock Labour Board* [31] which conflicts with the passages cited from *Barnard's* case.[32]

Finally, as to the validity of the conditions, those relating to the removal of buildings and plant are within the powers conferred by section 14 (1), which is in the widest possible terms. The removal of buildings was a " material consideration " within that subsection. The observations of Lord Evershed M.R. in *Fawcett Properties Ltd.* v. *Buckingham County Council* [33] are applicable here, namely, that conditions to be valid must " fairly " and reasonably " relate to the permitted development. The fact that the Minister could have acted under section 26 does not exclude him from acting under section 14 (1) in view of the wide terms of that subsection. Section 14 (2) (*a*) was added ex abundanti cautela and does not in any way restrict the generality of section 14 (1). The removal of the plant can be justified under section 14 (2) (*a*) as " requiring the carrying out of works " on land under the applicant's control. The word " works " is a neutral word and is equally applicable to the removal as to the construction of buildings on land. Section 30 (6) does not advance the appellants' argument. It is submitted that the conditions relating to blasting, screening, crushing and dust precautions can also be justified as falling within the word " works " in section 14 (2) (*a*). It was contended that under section 14 (2) (*a*) there was no power to suppress an existing use, but if " use " there did not include an existing use, there was no necessity for the word to be in the subsection. This is reinforced by a consideration of section 12 (2), where development is defined to include " the making of any material change in the use of " any buildings or other land." Accordingly, " use " in section 14 (2) (*a*) need not be confined to a *change* of use but includes also any existing use.

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[30] [1953] 2 Q.B. 18, 35–37, 41, 47; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113.

[31] [1957] A.C. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939.

[32] [1953] 2 Q.B. 18.

[33] [1959] Ch. 543, 559, 560.

Willis Q.C. in reply. *Whether planning permission required*: The remedy provided by section 17 of the Act of 1947 is a remedy of convenience and not of obligation. It gives the proposed developer an option to proceed under the section instead of pursuing his remedy at common law. It concerns not a hypothetical question but a real one, namely, the development which the applicant proposes to carry out. It would be wrong to exclude the subject's recourse to the courts to have his rights determined in the absence of clear words in the statute to that effect: see *per* McNair J. in *Francis* v. *Yiewsley and West Drayton Urban District Council*.[34] For an example of where Parliament has plainly excluded the subject's right, see section 11 (3) of the Act of 1947.

The respondents cannot succeed on this point unless they can prove that the question is governed by *Barraclough* v. *Brown*.[35] But that case is distinguishable, for there the right and remedy given by the statute were uno flatu, and the one could not be disassociated from the other. Section 17, however, has provided a method for determining a legal right which exists independently of the statute itself. There is here a clear distinction between the right and the remedy, and the right exists independently of section 17. It was also said that the Minister's decision was final, but that is a further ground for distinguishing the present case from *Barraclough* v. *Brown*.[35] In *Cooper* v. *Wilson*[36] it was held that although section 2 (3) of the Police Appeals Act, 1927, provided that an order made by the Secretary of State should be final and binding on all parties, nevertheless the court had jurisdiction to make the declarations sought and the subject was not confined to the right of appeal to the Secretary of State given by that Act.

As to whether the proposed development was " authorised " by the Act of 1924, the respondents placed reliance for their negative contention on section 37 of the Act of 1947. But that is a provision relating to compulsory acquisition and it is not disputed that in order to acquire land compulsorily specific powers must be given, for otherwise the acquirers would be trespassers. Section 37 is concerned with a special case, and it does not follow that " authorisation " has the same meaning in other parts of the Act.

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[34] [1957] 2 Q.B. 136, 148; [1957] 2 W.L.R. 627; [1957] 1 All E.R. 825.

[35] [1897] A.C. 615.

[36] [1937] 2 Q.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726.

In section 14 (2), which is in Part III of the Act, the concept of "authorisation" is much wider than it is in Part IV. In section 12 it is provided that "permission shall be required under "this Part [III] of this Act in respect of any development of "land which is carried out after the appointed day." That is in effect providing a procedure to protect persons intending to develop their land. It is not a mandatory provision that permission must be obtained before the development is carried out. Accordingly, an authorisation granted under Part III of the Act in respect of a development order made under section 13 must necessarily have the meaning of "countenancing, sanctioning and "approving." This is supported by the language used in Class XII, Sch. I, Part I, to the Order of 1948 (1950). It indicates that the word "authorised" in Class XII should be given a wide meaning for the reasons given by Morris L.J.[37] The word "authorised" is not limited to rights newly granted by statute but extends also to the confirmation of existing statutory rights.

The respondents also relied in support of this part of their case on the general objects of the Act of 1924. But the answer to that is that the general objects of the Act by virtue of section 54 have been modified in favour of the appellants. As to how far the courts are entitled to inquire into the circumstances surrounding the passing of a private Act of Parliament, see *Herron* v. *Rathmines and Rathgar Improvement Commissioners*.[38] It is submitted that section 54 is not governed by *Reg.* v. *Midland Railway Co.*[39]

As to the words "common or waste" in section 5, they are nouns and not words of description. An option to purchase is "lands" or an "interest therein" within section 49 of the Lands Clauses Consolidation Act, 1845: *Oppenheimer* v. *Minister of Transport*.[40] As a matter of definition based on section 5 of the Act of 1924 the Tank Quarry and the leasehold land are brought within paragraph 12 of the heads of agreement as being part of the appellants' "undertaking." The agreement of December 14, 1925, may be looked at to resolve any ambiguities in the Act. The only inference that can be drawn from clause 3 (*a*) of that agreement is that the Tank Quarry was within the Malvern Hills as defined in the Act.

On the question of jurisdiction, no authority has been cited to show that the remedies of seeking a declaration and certiorari are mutually exclusive. If there is a choice, that remedy is preferable which allows the matter to be fully dealt with as a declaration does in the present case. The fact that certiorari is or may have been available is not a ground for refusing a declaration: see *per* Greer L.J. in *Cooper* v. *Wilson*,[41] whose view appears to have been unanimously followed by the Court of Appeal in *Barnard* v. *National Dock Labour Board*.[42] It is at least very doubtful whether certiorari would lie against the Minister under sections 15 and 16 of the Act of 1947, because under those sections he is not exercising his powers in even a quasi-judicial manner. In *Ealing Borough Council* v. *Minister of Housing and Local Government*[43] a declaration was made under section 19 of the Act of 1947. If the respondents be right in their contention, the only remedy open to the plaintiffs in that case was certiorari. In view of certain observations by Lord Evershed M.R. in *Fawcett Properties Ltd.* v. *Buckingham County Council*[44] it is difficult to see how certiorari could operate in this type of case, since evidence could not be given. It follows, therefore, that if the view is taken that any or all of these conditions are invalid, this is a case where the court could properly exercise its discretion and grant a declaration.

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[37] [1958] 1 Q.B. 554, 587.

[38] [1892] A.C. 498, 502, 522, 523.

[39] 19 Q.B.D. 540.

[40] [1942] 1 K.B. 242; 58 T.L.R. 86; [1941] 3 All E.R. 485.

It was said that if these conditions are held to be invalid, then the whole permission falls to the ground, and, inter alia, *Reg.* v. *Bowman*[45] was cited in support of this proposition. That is a wrong approach to this question. The Minister would first decide aye or nay whether permission was to be granted. If so, he would then go on to consider whether any conditions should be imposed. That is quite different from the procedure adopted in *Reg.* v. *Bowman*,[45] which is, accordingly, distinguishable. In any event, there is authority for the proposition that the court in considering the validity or invalidity of a condition attached to a licence will sever the condition from the licence if the condition is held to be invalid: *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill*[46] and *Ellis* v. *Dubowski*.[47]

The respondents' argument on this point could lead to extraordinary results in relation to planning permission. Let it be supposed that planning permission is granted subject to a condition, and that, four years after the development in question has taken place, there is an application for a declaration that the condition is invalid. On the respondents' argument, the result would be that the developer, or a successor in title, who dared to question the validity of the condition would do so at peril of finding that the development had been carried out without any planning permission at all. If the development had taken place less than four years after the grant of permission the developer would be in jeopardy of enforcement proceedings being taken under section 23; the Minister would be bound to concede that, although the condition was invalid, nevertheless the planning permission as a whole was also invalid! Further, if development takes place subject to, say, 20 continuing conditions, 19 of them valid and one invalid, and action is taken to have the one condition held invalid, the whole permission would also fall to the ground together with the valid conditions, and the planning authority could not resurrect them if more than four years had elapsed since the grant of permission, for, in those circumstances, no enforcement proceedings could be taken: see section 23 (1) of the Act of 1947.

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[41] [1937] 2 K.B. 309, 321.

[42] [1953] 2 Q.B. 18, 36–38, 41–43, 47.

[43] [1952] Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.

[44] [1959] Ch. 543, 560.

[45] [1898] 1 Q.B. 663.

[46] [1915] 2 K.B. 49, 54; 31 T.L.R. 138.

[47] [1921] 3 K.B. 621, 626, 627; 37 T.L.R. 910.

As to the validity of the present conditions, it is not disputed that it is incumbent upon the appellants to show that the conditions are demonstrably unrelated to the permission granted: see *per* Lord Evershed M.R. in *Fawcett Properties Ltd.* v. *Buckingham County Council.*[48]

It is implicit in the respondents' argument that there is a hidden power in section 14 (1) of the Act of 1947 to suppress existing buildings or an existing use. It is submitted that power to do that is to be found only in section 26. Section 14 (2) does not carry the respondents' argument any further, and unless the planning authority can come within section 14 (2) in this case it cannot come within section 14 (1) having regard to the provisions of sections 26 and 27. The respondents' construction of section 14 is repugnant to the scheme of the Act and also to the terms of the Development Order, 1948 (1950): see Class XIX. It was contended that the conditions relating to blasting, the emission of dust, and crushing, were within section 14 (2) (*a*). But the Minister is not thereby "regulating" the appellants' activities but suppressing the freedom which the appellants hitherto enjoyed in relation to the operation of an existing use of the land.

Squibb Q.C. in reply on the question of certiorari. None of the cases cited by the appellants are authority for the proposition that if conditions are bad in law they can be attacked by way of a declaration. The proper method to test the matter is to go by way of certiorari.

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[48] [1959] Ch. 543, 563.

Their Lordships took time for consideration.

July 6, 1959. VISCOUNT SIMONDS. My Lords, the relevant facts and instruments are so fully stated in the opinion of my noble and learned friend, Lord Jenkins, which I have been privileged to read, that I recall at once what are the questions which your Lordships have to decide in this case.

There are at least two questions of primary importance which must be determined, two further questions which have been fully argued but in the view that I take of the first two questions no longer arise, and finally a fifth question which has given me more difficulty than any other, largely because it was little, if at all, discussed in the Court of Appeal and we have not the advantage of the opinion of that court upon it.

The first question, my Lords, is this. The appellant company are entitled as freeholders, leaseholders or licensees to carry on quarrying operations for the working and winning of stone upon certain lands which I will call part of the Malvern Hills. I leave for future consideration the question whether that is an accurate description; it is, in substance, the fifth question that I have mentioned. It is indisputable that such operations constitute "development" within the meaning of the Town and Country Planning Acts. From this it follows that such operations cannot be carried on without the permission of the relevant authority, whether the local planning authority or the proper Minister, at first the Minister of Town and Country Planning and later the Minister of Housing and Local Government. The question is whether such permission has in fact been given and it is to be resolved by a consideration of two instruments, first, the Town and Country Planning (General Development) Order of 1948 made under the authority of the Act of 1947, which for this purpose may be read as one with a similar Order of 1950 (I will refer to it as "the Development Order"), and, secondly, a private Act known as the Malvern Hills Act, 1924. By article 3 of the Development Order, the validity of which has not been challenged, it was provided that, subject as therein mentioned, development of any class specified in the First Schedule thereto was thereby permitted and might be undertaken upon land to which the Order applied, without the permission of the local planning authority or the Minister. The First Schedule contains in Class XII the words material to the decision of this case. They are: "Development authorised by any local or private Act "of Parliament or by an Order approved by both Houses of "Parliament, being an Act or Order which designates specifically "both the nature of the development thereby authorised and "the land upon which it may be carried out." I will assume that the Malvern Hills Act, 1924, to which I will refer as the "private Act," designates specifically the nature of the development and the land upon which it may be carried out, and I turn to the question which has been the sole issue in this part of the case, namely: Was the development authorised by the private Act? Upon this question differing opinions have been expressed. Lloyd-Jacob J. thought it was authorised; in the Court of Appeal Lord Denning and Hodson L.J., largely relying on *Reg.* v. *Midland Railway Co.*,[1] thought it was not, while Morris L.J. distinguished that case and upheld the view of Lloyd-Jacob J. I think that Morris L.J. was right.

My Lords, in the year 1924 the Malvern Hills Conservators, a body appointed under earlier Acts whose duty it was to preserve and control the Malvern Hills for the benefit of the public, promoted a Bill for the extension and definition of their powers. It was opposed by the appellant company, whose interest lay in the quarrying of stone upon their land. As commonly happens in such cases, a compromise was reached. It was embodied in a clause which became section 54 of the Act and was in these terms: "For the protection of the Pyx Granite Company "Limited (in this section referred to as 'the company') the "following provisions shall unless otherwise agreed in writing "between the company and the Conservators and the Malvern "Council have effect (that is to say):—The heads of agreement "as set forth in the Fourth Schedule to this Act are hereby "confirmed and made binding on the company and the Con- "servators and the Malvern Council and the provisions of this "Act shall only apply to or affect the undertaking property or "rights of the company subject to the provisions of the said "heads of agreement."

Postponing comment on a section which is in some respects remarkable, I turn to the scheduled heads of agreement and I find myself so fully in agreement with Morris L.J. in his description of their tenor and effect in conjunction with the Act that I take the liberty of quoting it and adopting it as my own. "That "Act," he said,[2] "was one which effected most carefully worked "out planning in regard to the Malvern Hills. The conservators "were given additional powers. The company agreed to a "limitation and fixation of their rights. From their previously "existing rights something was extracted, and to them something else was added. The company's rights were limited, "outside their freehold property, to a defined quarryable area. "It was implicit in the agreement made that the continuing "rights of the company to quarry on their freehold area were "recognised. The company were to supply the council with "stone for the repair of roads. The company were to put in "repair a quarry road between certain defined points, and were "to keep such road in repair. The company were to widen the "quarry road to permit of a footpath by the side of it. The "company were to be at liberty to make and use a tunnel under "the area of land dividing their freehold property from the "quarries which the council were handing over to the company. "All this elaborately worked out detailed planning was, in my "judgment, formally approved by Parliament when it provided "by section 54 that, for the 'protection' of the company, the "Act should only apply to or affect the undertaking, property or "rights of the company subject to the provisions of the heads "of agreement. It seems to me that formal approval and "sanction were given by Parliament to the activities of the "company as planned and arranged within the scope of the "agreement that was made. In this way the activities of "the company which constituted 'development' were, in a very "real sense, 'authorised' by the Act of 1924. Parliament "enacted that the specific arrangements (under which the range "of the company's activities was defined and limited) were "confirmed and made binding on the company, the conservators "and the Malvern Council. I feel impelled to the view that "Parliament authorised the arrangements which it confirmed "and made binding." I emphasise that, as the learned Lord Justice points out, the 54th section of the Act is expressed to be "for the protection of the company," and that no better protection from the obligations or liabilities that would otherwise be imposed on it could be provided than by the limiting words of the last lines of the section. But for this section and these words in particular quarrying would be subject to restriction. Their presence means that the company can claim the authority of Parliament to continue their operations. It would, I think, be taking too narrow a view of the meaning of the word "authorised" to exclude from its scope such a result. I do not think it necessary to refer to head 14 of the heads of agreement, or to the litigation to which it gave rise. They do not affect the single question for your Lordships' determination, namely, whether the proposed development is "authorised" by the private Act. It is, however, proper to note that in the year 1925 the parties entered into a formal agreement as contemplated by head 18. Grave difficulties might have arisen if there had been substantial departure from the terms of the heads of agreement, and I do not venture to say what then might have been the result of the words "unless otherwise agreed," etc., in section 54. Fortunately that question does not arise.

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[1] (1887) 19 Q.B.D. 540.

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[2] [1958] 1 Q.B. 554, 584.

My Lords, I think that the other members of the Court of Appeal might have come to the same conclusion but for *Reg.* v. *Midland Railway Co.*,[3] to which I have referred. That case is not binding on your Lordships, but it is of respectable antiquity and I see no reason to challenge its correctness. But it is, for the reasons given by Morris L.J.,[4] clearly distinguishable. I would again respectfully adopt what he has said, but I would add that in the present case the confirmation of the agreement, the feature which it has in common with the agreement in the cited case, is attended by another feature which is wholly absent from that case, namely, the emphatic provision in the last lines of the section to which I have more than once referred.

I conclude, therefore, this part of the case by saying that the proposed development by the appellant company fell within Class XII of the Development Order and permission was, in my opinion, not required. I should add here that it was conceded by the respondents that in their submission to this effect the appellant company were not prejudiced by the fact that they made an application to the Minister which they subsequently asserted to be unnecessary.

I come now to the second question which must be decided. It was submitted by the respondents that the court had no jurisdiction to entertain the action. It was urged that section 17 of the Act supplied the only procedure by which the subject could ascertain whether permission is necessary for the development of his land. That section enacts that if any person who proposes to carry out "any operations on land . . . wishes to "have it determined . . . whether an application for permis- "sion in respect thereof is required under this Part of this Act "having regard to the provisions of the development order, he "may . . . apply to the local planning authority to determine "that question." This matter is somewhat complicated by the fact that under other sections of the Act the Minister may "call in" the application for his own determination. But nothing turns on this, for, whether the application is heard in the first place by the local planning authority and then on appeal by the Minister or is heard in the first place upon a "call in" by the Minister, his determination is expressed to be final. The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded; for, as Lord Denning has pointed out,[5] if the subject does what he has not permission to do and so-called enforcement proceedings are taken against him, he can apply to the court of summary jurisdiction under section 23 of the Act and ask for the enforcement notice to be quashed, and he can thence go to the High Court upon case stated. But I agree with Lord Denning and Morris L.J. in thinking that this circuity is not necessary. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[6] a "fundamental rule" from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away. And it appears to me that the case would be unarguable but for the fact that in *Barraclough* v. *Brown*[7] upon a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case. There the statute gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. "I do "not think," said Lord Herschell,[8] "the appellant can claim "to recover by virtue of the statute, and at the same time insist "upon doing so by means other than those prescribed by the "statute which alone confers the right." Or, as Lord Watson said[9]: "The right and the remedy are given uno flatu, and the "one cannot be dissociated from the other." The circumstances here are far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There is, in my opinion, nothing in *Barraclough* v. *Brown*[10] which denies them that remedy, if it is otherwise appropriate.

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[3] 19 Q.B.D. 540.

[4] [1958] 1 Q.B. 554, 585–588.

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[5] [1958] 1 Q.B. 554, 566, 567.

[6] [1957] 2 Q.B. 136, 148; [1957] 1 All E.R. 825.

[7] [1897] A.C. 615; 13 T.L.R. 527.

The appropriateness of the remedy was the final point on this part of the case. It was urged that, even if the court had jurisdiction to make the declaration claimed, it was a discretionary jurisdiction which should not be exercised in this case. My Lords, this plea should not, in my opinion, prevail. It is surely proper that in a case like this involving, as many days of argument showed, difficult questions of construction of Acts of Parliament, a court of law should declare what are the rights of the subject who claims to have them determined. I do not dissent from the contention of the respondents that, where the administrative or the quasi-judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the court. But here, if ever, was a case where the jurisdiction could properly be invoked. It might even be thought surprising that the Minister should not be glad to have such questions authoritatively determined.

These two questions being thus determined, namely, that the court has jurisdiction to declare that the development proposed by the appellant company does not require the Minister's permission and that such a declaration ought to be made, two other questions which occupied the courts below need not be considered. They were (1) whether the Minister could lawfully annex certain conditions to the limited permission that he gave, and (2) whether their legality could be challenged except by certiorari. If no permission was required, the question of the legality of annexed conditions cannot arise.

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[8] [1897] A.C. 615, 620.

[9] Ibid. 622.

[10] [1897] A.C. 615.

The fifth and final question has caused me much difficulty. It is a question which, if the private Act had been drafted with proper care, could never have arisen, and it does not appear to have been seriously raised at any rate in the Court of Appeal. I have doubted whether it is permissible to raise it in this House. But I have come to the conclusion, with which I think your Lordships agree, that, if only to quiet doubts, the matter should be disposed of. The question is no less than what is the area which is the subject of the private Act, and therefore the area in respect of which under the Act of 1947 permission for development is not required. And it is the more strange that there should be any doubt about this, when it appears that the land, about which the doubt may arise, is for the purpose of quarrying operations the most important to the appellant company. The difficulty, my Lords, arises initially from the language of section 5 of the private Act which defines the area of the conservators' jurisdiction. It is said to " comprise the lands rights " and interests described in the First, Second and Third " Schedules to this Act together with all lands common or " waste over which the Conservators now have or may hereafter " acquire rights and interests all of which are in this Act referred " to as ' the Malvern Hills.' " The meaning of the expression " all lands common or waste " has been debated, and it has been urged that, since common and waste are themselves a kind of land, these words must be read as adjectivally qualifying lands and the expression must be read as if it were " common or " waste lands." The result of this would be to exclude from the conservators' jurisdiction any land in which they might have or acquire any right or interest other than common or waste land. So strange a consequence must be avoided if any other interpretation is possible. I think that it is, for I do not regard it as extravagant to suppose that the draftsman of this Act, if only ex majore cautela, thought it proper to add " common or " waste " in case it should be supposed that they were not " lands." It is legitimate to add that if common or waste lands only were intended the transposition to " lands common or "waste" is one that requires explanation, which is not forthcoming. I conclude, then, that "the Malvern Hills" include any freehold land in which the conservators had upon the passing of the Act any right or interest. Now, the appellant company were the owners of the freehold of a parcel of land immediately adjoining other land over which they had quarrying rights and which were beyond doubt part of the Malvern Hills. Upon it was situate a quarry known as Tank Quarry, and it is common ground that the working of this quarry was as important to them as was the control of such working essential to the conservators. It would not, therefore, be surprising to find that any bargain between them dealt with this land. And so it was. For the agreement between them, both the heads scheduled to the private Act and the formal agreement executed in 1925, provided that the conservators should have an option within a limited time to purchase the undertaking of the appellant company. The undertaking included the land in question. Therefore this land was land in which the conservators had at the time of the passing of the Act or by virtue of the agreement acquired an undoubted right or interest. It fell forthwith within the description of Malvern Hills in the private Act and thenceforward retained that label whether or not the option was exercised. It is satisfactory to note, though I should not be prepared to rely on the doctrine of contemporanea expositio in such a case, that it is in this way that the parties, particularly in the formal agreement of 1925, interpreted the private Act and its schedules.

I am therefore of opinion that the freehold land in question is land in respect of which permission for development was not required, and I would allow this appeal and restore the judgment of Lloyd-Jacob J. with costs here and below.

Lord Goddard. My Lords, the appellants in this case seek a declaration as to whether or not they require planning permission for the working of quarries either on their freehold land or on land leased to them. The respondents contended that this question was within the exclusive jurisdiction of the Minister, either by way of appeal from the planning authority, or if, as happened here, he had called in the case for his own decision in the first instance. In support of this contention the respondents relied on the decision of this House in *Barraclough* v. *Brown*.[11] What that case decided was that where a statute conferred a right, which had not hitherto existed, to recover certain expenses in a court of summary jurisdiction, it was to that court alone to which recourse must be had, and that those seeking to recover the expenses could not first ask the High Court to declare that the right to recover existed. It was for the court indicated by the statute to decide both as to the right and the amount. I agree with the majority in the Court of Appeal, who held that this decision had no application to the facts of this case and that there were no words in the statute which deprived the appellants of their right to obtain a declaration. It was also argued that if there was a remedy obtainable in the High Court it must be by way of certiorari. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

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[11] [1897] A.C. 615.

The main question in this appeal is whether the proposed development on the appellants' lands is authorised by any local or personal Act of Parliament, for if it is, no planning permission is required. The statutory authority relied on is section 54 of the Malvern Hills Act, 1924, which gives effect to and makes binding on the appellants, the conservators and the Malvern Council certain heads of agreement which are set out in the Fourth Schedule to the Act. In the Court of Appeal, relying on *Reg.* v. *Midland Railway Co.*,[12] Lord Denning put the question succinctly in this way[13]: Does the section make the heads of agreement as binding as a contract, simply dispensing with the execution by the parties, or does it make them as binding as a statute giving them the same force as if enacted in the statute itself. On this question I am in full agreement with the judgment of Morris L.J. He held that the statute conferred protection on the company, recognising their existing rights in respect of their freehold property and governing and defining their other rights. The section is inserted in the Act expressly for the protection of the company and provides that the Act is only to apply to the undertaking, property or rights of the company subject to the provisions of the heads of agreement. In my opinion the protection given by the section extends to the freehold property as well as to the leaseholds. The heads of agreement limit the rights of the company of quarrying outside their freehold, and thereby impliedly recognise the right of quarrying inside it. Accordingly, in my opinion, development by quarrying is authorised by the statute and no planning permission is required. It is therefore unnecessary to consider the validity of the conditions which the Minister purported to impose, and I would allow the appeal.

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[12] 19 Q.B.D. 540.

[13] [1958] 1 Q.B. 554, 569.

Lord Oaksey. My Lords, I have had the opportunity of reading the opinion of my noble and learned friend, Lord Goddard, and I agree with it.

Lord Keith of Avonholm. My Lords, I have had the advantage of reading the opinion to be delivered by my noble and learned friend, Lord Jenkins, and agree with the result at which he has arrived and with his reasons, with one qualification.

I have difficulty in agreeing that the company's freehold land, which was the site of the Tank Quarry, was within the jurisdiction of the conservators in terms of section 5 of the Act of 1924 and so was part of the area defined under that section as "the "Malvern Hills." The only power, as I see it, that the conservators had with reference to that area, and even here I have had great doubt, is under the option given them by paragraph 12 of the Fourth Schedule to purchase the company's undertaking as a going concern in the third, fourth, or fifth year after the passing of the Act. The purchase of the undertaking would, I think, have stopped all quarrying operations by the company in their quarrying area (including their freehold land). Whether it would have transferred the freehold to the conservators is much more doubtful. But this power, whatever its effect, could not, I think, bring the freehold land within the jurisdiction of the conservators under section 5 until it was exercised. It was not exercised and is now spent. I have difficulty in seeing how on any view it can now be within their jurisdiction.

But that does not, in my opinion, affect the result of this appeal. Section 54 of the Act of 1924 provides that the provisions of the Act shall only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement set forth in the Fourth Schedule. The first head of this agreement says: "The company's rights of quarrying to "be limited (outside their freehold property) to the quarryable "area at North Malvern defined [on the Islington plan]." I read this as meaning that the quarrying rights are to be limited except with regard to the freehold property. The only thing that could have affected this unlimited right might have been acquisition of the undertaking under head 12 of the agreement. Just as the limited quarrying rights were, I think, authorised by the Act, so I think the unlimited rights were authorised by the Act. I accordingly agree that this appeal should be allowed.

Lord Jenkins. My Lords, the litigation in which this appeal arises concerns a dispute between the appellant company and the respondent Ministry and County Council on the question whether (as contended by the company) the working by the company after the appointed day of (so far as now material) two granite quarries in the Malvern Hills known respectively as the Tank Quarry and the North Quarry, which admittedly constitutes development within the meaning of the Town and Country Planning Act, 1947, is development which was unconditionally permitted under article 3 of the First Schedule to the Town and Country Planning (General Development) Order, 1948, made in pursuance of section 13 of that Act. The company contend that this question should be answered in the affirmative on the ground that such working is within the meaning of Class XII in such Schedule, " Development authorised by any local or private Act of Parliament . . . " being an Act . . . which designates specifically both the nature " of the development thereby authorised and the land upon which " it may be carried out," the Act relied on by the company as having authorised the development being the Malvern Hills Acts, 1884 to 1924.

If the company's contention to the above effect is well founded, it is common ground that the permission which (as hereinafter appears) the Minister purported to grant to the company under sections 14 and 15 of the Act to work the quarries upon certain conditions was wholly inoperative, inasmuch as the company already had unconditional permission to work them under the Order.

If, on the other hand, this contention fails, and the question of permission must accordingly be taken to have remained at large for the Minister's decision, the company contends that certain of the conditions which the Minister purported to impose were ultra vires, and that the permission must therefore take effect free of those conditions.

On December 21, 1954, the company commenced the present action claiming relief in the shape of declarations framed with a view to establishing the contentions to which I have briefly referred.

The respondents took a preliminary objection to the effect that the court had no jurisdiction to adjudicate upon the company's claim that the working of the quarries was development falling within the terms of Class XII in the First Schedule to the Order, and therefore unconditionally permitted, on the ground that the statutory procedure for the determination of questions such as this provided by section 17 of the Act was exhaustive, and that the jurisdiction thereby conferred on the local authority or the Minister was exclusive.

The respondents also raised a preliminary objection with respect to the company's subsidiary contention that, even if the permission granted by the Minister was otherwise operative, certain of the conditions attached to it were ultra vires. This objection was to the effect that the validity of the conditions imposed by the Minister could only be challenged by certiorari, the time for which was long past, and not by an action for a declaration; and further that in any event the court should on principle refuse to interfere by declaration in a matter essentially depending on the Minister's discretion.

The case was heard by Lloyd-Jacob J., who decided in favour of the company on all points, and by his judgment dated April 16, 1957, granted the declarations sought. The respondents appealed from the judgment, and on February 7, 1958, the Court of Appeal (Lord Denning, Hodson and Morris L.JJ.) by a majority (Morris L.J. dissenting) allowed the appeal. Lord Denning rejected the respondents' preliminary objection based on section 17 of the Act, so far agreeing with Morris L.J.; Hodson L.J., on the other hand, was for upholding it. Lord Denning, agreeing in this with Hodson L.J., held that the development constituted by the working of the quarries was not "authorised" by the Malvern Hills Acts within the meaning of Class XII of the First Schedule to the Order. Morris L.J., on the other hand, held that this development was so authorised.

As to the validity of the conditions, and the preliminary objection that this question could not be made the subject of a declaration, Lord Denning rejected the preliminary objection but held that the conditions were valid. Hodson L.J. agreed that the conditions were valid. He doubted whether the Minister's decision could be impeached by declaration, and moreover was of opinion that if the Minister's decision could be so impeached the result of declaring the conditions invalid could only be to destroy the entire permission. In the view taken by Morris L.J.

on the rest of the case, the questions as to the validity of the conditions and the right of the company to seek a declaration thereon did not arise, but he intimated that, if he had shared the view that they did arise, he would have agreed with Lord Denning's conclusions in regard to them. From that judgment the company now appeals to your Lordships' House.

It is not surprising that the case has been the subject of a conflict of judicial opinion in the courts below, for it raises questions of considerable difficulty. To make discussion of the points at issue intelligible I should next refer to some of the provisions of the Act of 1947.

Section 12 provides by subsections (1) and (2) as follows: "12.—(1) Subject to the provisions of this section and to the "following provisions of this Act, permission shall be required "under this Part of this Act in respect of any development of "land which is carried out after the appointed day. (2) In this "Act, except where the context otherwise requires, the expression "'development' means the carrying out of building, engineering, "mining or other operations in, on, over or under land, or the "making of any material change in the use of any buildings or "other land. . . ."

Section 13 provides by subsections (1) and (2) as follows: "13.—(1) The Minister shall by order provide for the grant of "permission for the development of land under this Part of this "Act, and such permission may be granted—(*a*) in the case of "any development specified in any such order, or in the case "of development of any class so specified, by that order itself; "(*b*) in any other case, by the local planning authority (or, in "the cases hereinafter provided, by the Minister) on an application in that behalf made to the local planning authority in "accordance with the provisions of the order. (2) An order under "subsection (1) of this section (hereinafter called a 'development "'order') may be made either as a general order applicable "(subject to such exceptions as may be specified therein) to all "land, or as a special order applicable only to such land as may "be so specified, and the permission granted by any such order "may be granted either unconditionally or subject to such conditions or limitations as may be so specified."

Section 14 provides by subsection (1) as follows: "14.—(1) "Subject to the provisions of this and the next following section, "where application is made to the local planning authority for "permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they "think fit, or may refuse permission; and in dealing with any "such application the local planning authority shall have regard "to the provisions of the development plan, so far as material "thereto, and to any other material considerations."

Section 15 provides as follows: "15.—(1) The Minister may "give directions to any local planning authority, or to local "planning authorities generally, requiring that any application "for permission to develop land, or all such applications of any "class specified in the directions, shall be referred to the Minister "instead of being dealt with by the local planning authority, "and any such application shall be so referred accordingly. "(2) Where an application for permission to develop land is "referred to the Minister under this section, the provisions of "subsections (1) and (2) of the last foregoing section shall apply, "subject to any necessary modifications, in relation to the determination of the application by the Minister as they apply in "relation to the determination of such an application by the local "planning authority: Provided that before determining any such "application the Minister shall, if either the applicant or the "local planning authority so desire, afford to each of them an "opportunity of appearing before and being heard by a person "appointed by the Minister for the purpose. (3) The decision "of the Minister on any application referred to him under this "section shall be final."

Section 16 provides: "16.—(1) Where application is made "under this Part of this Act to a local planning authority for "permission to develop land, or for any approval of that authority "required under a development order, and that permission or "approval is refused by that authority, or is granted by them "subject to conditions, then if the applicant is aggrieved by their "decision he may by notice served within the time, not being less "than twenty-eight days from the receipt of notification of their "decision, and in the manner prescribed by the development "order, appeal to the Minister: . . . (2) Where an appeal is "brought under this section from a decision of the local planning "authority the Minister may allow or dismiss the appeal or may "reverse or vary any part of the decision of the local planning "authority, whether or not the appeal relates to that part, and "deal with the application as if it had been made to him in the "first instance; and the provisions of the last foregoing section "shall apply, subject to any necessary modifications, in relation to "the determination of an application by the Minister on appeal

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"under this section as they apply in relation to the determination "by the Minister of an application referred to him under that "section."

Section 17 provides as follows: "17.—(1) If any person who "proposes to carry out any operations on land or make any "change in the use of land wishes to have it determined whether "the carrying out of those operations or the making of that "change in the use of the land, would constitute or involve "development of the land within the meaning of this Act, and, "if so, whether an application for permission in respect thereof "is required under this Part of this Act having regard to the "provisions of the development order, he may, either as part of "an application for such permission, or without any such application, apply to the local planning authority to determine that "question. (2) The foregoing provisions of this Part of this Act "shall, subject to any necessary modifications, apply in relation "to any application under this section and to the determination "thereof as they apply in relation to applications for permission "to develop land and to the determination of such applications: "Provided that where it is decided by the Minister under any of "the said provisions that any operations or use to which an application under this section relates would constitute or involve "development of the land, or that an application for permission "is required as aforesaid in respect thereof, that decision shall "not be final for the purposes of any appeal to the court under "the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that "use."

Section 23 deals with enforcement of planning control. Subsection (1) enables the local planning authority to serve an enforcement notice in respect of any development carried out without permission or in breach of conditions, and such notice "may . . . require the demolition or alteration of any buildings "or works, the discontinuance of any use of land, or the carrying "out on land of any building or other operations." Subsection (4) gives a right of appeal to a court of summary jurisdiction, and subsection (5) gives a right of appeal from the court of summary jurisdiction to a court of quarter sessions.

Sections 26 and 27 in certain cases empower the local planning authority by order confirmed by the Minister to require the discontinuance of authorised uses of land subject to compensation in respect of any damage shown to have been suffered by any person in consequence of the order. These provisions have not been resorted to in the present case.

Section 118 (1) declares "for the avoidance of doubt" that the provisions of the Act are applicable to land regulated by special enactments, but again this provision has not been resorted to here.

The planning history of the matter is briefly this.

The Town and Country Planning Act, 1947, which repealed a number of earlier enactments relating to town and country planning, received the Royal Assent on August 6, 1947, but did not come into operation until the appointed day fixed under section 20 of the Act, namely, July 1, 1948.

Between those two dates, namely, on November 17, 1947, the company made an application to the Malvern Urban District Council under the repealed enactments for permission to develop the land on which their quarries were situated "for quarrying "purposes including mining or quarrying operations . . . tipping . . . and the usual processing and manufacture for sale "thereof as heretofore."

This application included a reference to the "special statutory "control of amenities" in the area by the Malvern Hills Conservators, but it is clear that the company cannot at that time have appreciated the vital bearing the Malvern Hills Acts, 1884 to 1924, might have on the question of permission.

By virtue of the transitional provisions contained in the Tenth Schedule to the Act of 1947 this application was treated as having been made on the appointed day under section 14 of that Act.

The next step was a direction by the Minister dated January 14, 1948, under the repealed enactments, which by virtue of the transitional provisions aforesaid was treated as a direction given on the appointed day under section 15 of the Act of 1947, that is to say, a direction that the company's application should be referred to the Minister instead of being dealt with by the local planning authority.

Next, after the Act of 1947 had come into force, there was a letter dated September 5, 1949, from the Minister giving the company permission to work the North Quarry (which had developed a dangerous fault) only to the extent necessary to ensure safety, and subject to certain other conditions.

On June 11, 1952, the Minister informed the company that a public local inquiry was to be held in regard (inter alia) to the company's application of November 17, 1947, and such inquiry was in due course held.

Finally, by a letter dated September 30, 1953, to the company the Minister informed them of his decision on their application. That letter contained this passage: "At the inquiry it was contended, on behalf of the applicants, that the quarry operations "proposed were development included in Class XII of the First "Schedule to Part I of the Town and Country Planning General "Development Order, 1950, in respect of which permission had "been granted by article 3 of that Order. The Minister is "advised, however, that notwithstanding the provisions of the "Malvern Hills Act, 1924, and the said Order, permission is "required for the continuance of the operations in question; and "he must therefore deal with the application on its merits." The effect of the Minister's decision was that he refused permission altogether in respect of the North Quarry area and parts of the Tank Quarry area, but granted permission with respect to the remainder of the Tank Quarry area subject to a number of conditions, including one to the effect that the winning and working of granite should be limited to a period ending June 30, 1966. The Minister went on to say that the permission granted by his decision of September 5, 1949, was not affected by the present decision.

The General Development Order of 1948 which is relied on by the company as having by article 3 thereof given unconditional permission for the development in question under Class XII in the First Schedule thereto, came into force on the appointed day, namely, July 1, 1948, that being also the date on which the company's application was treated as having been made under the Act of 1947 by virtue of the provisions in the Tenth Schedule to that Act. As from May 22, 1950, the General Order of 1948 was replaced by the Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728) but the Order of 1950 preserved, in article 3 thereof and Class XII in Part I of the First Schedule thereto, the effect of article 3 and Class XII in the First Schedule to the 1948 General Order, and, accordingly, there is no material distinction between the two Orders for the present purpose. Both Orders contained in article 4 provisions under which a direction excluding the development now in question from the permission accorded by article 3 could have been given, but these provisions have not been resorted to in the present case.

This was how the matter stood when the company on December 21, 1954, commenced their action against the respondent Ministry and County Council for declaratory relief of the nature I have indicated, and I may now return to the issues raised.

It will be convenient to deal first with the preliminary objection based on section 17 of the Act.

The argument for the respondents is of this nature.

Section 15 (3) provides that the decision of the Minister on any application referred to him under that section is to be final. Section 16 provides by reference to section 15 (3) that the decision of the Minister on any application determined by him on an appeal from the local planning authority shall likewise be final. Section 17 itself provides by subsection (2) that the foregoing provisions of Part III of the Act (which, be it observed, include sections 15 and 16) shall apply in relation to any application under section 17 as they apply in relation to applications to develop land and to the determination of such applications. The effect of that clearly must be to make the Minister's decision under section 17 (2) final, subject only to the proviso to subsection (2) under which a decision of the Minister to the effect that the relevant operations or use would constitute development, or that an application for permission is required in respect thereof is not to be final for the purposes of any appeal to the court under the enforcement provisions of Part III, the reference being to the right of appeal to a court of summary jurisdiction given by section 23. In this context—so proceeds the argument—it is plainly the intention of section 17 that with the qualification introduced by the proviso to subsection (2) the Minister should have exclusive jurisdiction finally to determine whether any given operations on or change of use of land would constitute development, and, if so, whether an application for permission in respect thereof is required, just as he has exclusive jurisdiction finally to determine an application referred to him under section 15, or coming before him on an appeal from the local planning authority under section 16. The matters on which the Minister is empowered to adjudicate under section 17 include the very point at issue here. In short, the statute has prescribed the tribunal which is to determine the matters referred to in section 17, and by so doing has precluded recourse to any other tribunal.

I am not concerned to dispute that where an application has been made, and referred to the Minister under section 15, or brought before him on appeal under section 16, and he has made his decision thereon, the finality with which that decision is invested by the express terms of the Act could not be challenged by the applicant in proceedings against the Minister for a declaration to the effect that his decision was wrong. Nor am I concerned to dispute that a person who has applied for and obtained the Minister's ruling under section 17 (1) of the Act is (subject only to the proviso to subsection (2) where applicable) similarly precluded from challenging its finality in any such proceeding. But, as I think, very fairly in the circumstances of the case, Mr. Squibb (for the respondents) disclaimed the argument that the Minister's decision on the company's application referred to him under section 15 of the Act now precludes the company from raising the contention that unconditional permission was automatically granted on the appointed day by the General Development Order of 1948, and that the application and the Minister's decisions thereon were therefore wholly ineffectual.

Accordingly, the respondents' preliminary objection is to be dealt with on the footing that this contention was one which it was open to the company to raise at the time of action brought, the only question being whether they were entitled to raise it, as they sought to do, by an action in the High Court for declaratory relief, or were, as the respondents contend, confined by the terms of the Act of 1947 to raising it for the decision of the local planning authority, or of the Minister on appeal, under section 17 of the Act.

The respondents contend that the company were so confined. on the ground that planning control is purely a creature of statute. that the statute creating it has prescribed by section 17 a particular mode of deciding with respect to it questions of the nature described in section 17, and, accordingly, that section 17 must be construed as excluding recourse to any other tribunal for the decision of any question of that nature.

It is said that this proposition is warranted by the case in your Lordships' House of *Barraclough* v. *Brown*.[14] In that case (to put it shortly) the undertakers of a certain navigation were by a private Act of Parliament empowered, in the event of any vessel being sunk in the navigation, to remove the vessel and to defray the expenses by sale, or if they thought fit to "recover such "expenses from the owner of such . . . vessel in a court of "summary jurisdiction." The undertakers sued in the High Court the persons who had been the owners of the sunken vessel at the time of the sinking, but had ceased to be such before the expenses were incurred, claiming the amount of the expenses as damages recoverable at common law. It was objected that the court had no jurisdiction to entertain the action, and the undertakers sought to meet this objection by the argument that even if they could not recover the expenses by an action in the High Court, they were at all events entitled to come to the High Court for a declaration that upon the true interpretation of the statute they had a right to recover them. The undertakers failed in both courts below and in your Lordships' House. In holding that the appeal should be dismissed Lord Herschell said [15]: "Unwilling "as I am to determine the appeal otherwise than on the merits of "the case, I feel bound to hold that it was not competent for the "appellant to recover the expenses, even if the respondents were "liable for them, by action in the High Court. The respondents "were under no liability to pay these expenses at common law. "The liability, if it exists, is created by the enactment I have "quoted. No words are to be found in that enactment con- "stituting the expenses incurred a debt due from the owners of "the vessel. The only right conferred is 'to recover such "'expenses from the owner of such vessel in a court of summary "'jurisdiction.' I do not think the appellant can claim to recover "by virtue of the statute, and at the same time insist upon doing "so by means other than those prescribed by the statute which "alone confers the right." Dealing with the argument that a claim for a declaration could be maintained, he said this [16]: "It "might be enough to say that no such case was made by the "appellant's claim. But, apart from this, I think it would be "very mischievous to hold that when a party is compelled by "statute to resort to an inferior court he can come first to the "High Court to have his right to recover—the very matter rele- "gated to the inferior court—determined. Such a proposition "was not supported by authority, and is, I think, unsound in "principle." Lord Watson said [17]: "The only right which the "undertakers have to recover from an owner is conferred by these "words: 'Or the undertakers may, if they think fit, recover such "'expenses from the owner of such boat, barge, or vessel in a "'court of summary jurisdiction.' The right and the remedy are "given uno flatu, and the one cannot be dissociated from the "other. By these words the legislature has, in my opinion, com- "mitted to the summary court exclusive jurisdiction, not merely "to assess the amount of expenses to be repaid to the undertaker, "but to determine by whom the amount is payable; and has, "therefore, by plain implication, enacted that no other court has "any authority to entertain or decide these matters." Lord Shand said[18]: "I agree entirely with what has fallen from my noble "friend Lord Watson on both points. It appears to me that the "jurisdiction which can alone be exercised in a case of this kind "belongs to a court of summary jurisdiction, and that, therefore, "this suit could not be properly initiated in the court in which "it has been brought." Lord Davey said[18]: "My Lords, I "agree . . . that there is no common law right of action in this "case, and that the High Court had no jurisdiction over the "subject-matter of this action under the . . . Acts, and that the "appeal must consequently be dismissed. I only desire to "express my dissent from the contention . . . that although the "High Court could not make any judgment or give any relief in "this action, the court might make a declaration binding the "rights of the parties. In my opinion this is altogether wrong."

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[14] [1897] A.C. 615.

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[15] [1897] A.C. 615, 619.

[16] Ibid. 620.

[17] Ibid. 622.

The principle which the respondents seek to call in aid is succinctly stated by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford*,[19] where he observed that there were three classes of cases in which a liability might be established founded upon a statute, and said of the third: "But there is a "third class, viz., where a liability not existing at common law is "created by a statute which at the same time gives a special and "particular remedy for enforcing it. The present case falls within "this latter class, if any liability at all exists. The remedy pro"vided by the statute must be followed, and it is not competent "to the party to pursue the course applicable to cases of the "second class. The form given by the statute must be adopted "and adhered to. The company are bound to follow the form of "remedy provided by the statute which gives them the right to "sue."

In truth, the validity of the principle relied on by the respondents is not open to doubt. But the question is whether it is applicable in the present case, and, in my opinion, it is not.

Where a statute creates a new right which has no existence apart from the statute creating it, and the statute creating the right at the same time prescribes a particular method of enforcing it, then, in the words of Lord Watson in *Barraclough* v. *Brown*,[20] "the right and the remedy are given uno flatu, and the one "cannot be dissociated from the other." As Lord Herschell put it in the same case,[21] the party asserting the right cannot "claim "to recover by virtue of the statute, and at the same time insist

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[18] [1897] A.C. 615, 623.
[19] (1859) 6 C.B.N.S. 336, 356.
[20] [1897] A.C. 615, 622.
[21] Ibid. 620.

"upon doing so by means other than those prescribed by the "statute which alone confers the right." The principle is wholly apposite in cases comparable to *Barraclough* v. *Brown*.[22] If A has a right founded entirely upon a particular statute to recover a sum of money from B, and the statute goes on to provide that the sum in question may be recovered in proceedings of a particular kind, then it is wholly reasonable to impute to the legislature an intention that the sum in question, recoverable solely by virtue of the statute, should be recoverable in proceedings of the kind provided by the statute and not otherwise. The statute puts upon B for the benefit of A a liability to which B could not otherwise be subjected, and at the same time prescribes a particular form of proceedings in which it may be enforced. No doubt B must then submit to being amerced to the extent and in the manner provided by the statute. But the incidents of the burden cast upon B by the terms of the statute are not to be changed from or made more onerous than those which the statute provides, as they would be if A was at liberty to recover the sum in question, or seek a declaration of his right to recover it, in any other form of proceedings to which he might choose to have recourse. As it seems to me, the purpose underlying the principle is the protection of the person against whom the statutory right is asserted from oppression on the part of the person asserting it.

But how does the principle stand in relation to the planning legislation?

The Act of 1947, so far as it relates to planning, cannot be said to confer uno flatu on a landowner statutory rights coupled with particular remedies for breaches of those rights. On the contrary, that Act restricts to a remarkable degree the ordinary right of a landowner to deal with his land as he pleases; and it might almost be said that the only rights it creates are rights conferred on the Minister and the local planning authorities for the purpose of performing their statutory duty in relation to the administration and enforcement of planning control.

Section 17 of the Act of 1947 cannot, in my judgment, reasonably be described as conferring upon landowners a special remedy for the enforcement of statutory rights. On the contrary, what it appears to me to do is to provide a cheap and expeditious procedure by which they can if they so desire ascertain the extent of the restrictions which, according to official opinion, are imposed by the Act on their ordinary rights as landowners. The company here cannot be said to occupy the position of the undertakers in *Barraclough* v. *Brown*.[23] They are not seeking to enforce statutory rights by methods other than those prescribed by the Act creating them. They are merely seeking to ascertain the extent of their statutory liabilities. It is true that section 17 itself may be said in a sense to create a statutory remedy in the shape of an application under it for the determination of any question of the kind to which it refers, but it is not a remedy for the breach of any statutory right. It is merely directed to the removal of doubts regarding the effect of the legislation in particular cases.

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[22] [1897] A.C. 615.

For these reasons, the principle of *Barraclough* v. *Brown*[24] has, in my judgment, no application here, and apart from that principle I can find no sufficient ground for holding that section 17 provides an exclusive method of determining questions of the kind to which it relates, and deprives the courts of the jurisdiction which they ordinarily possess of determining by declaration questions of that description.

Clear words would be necessary to produce this result, and paying due regard to the terms of section 17, and to the argument that it must be read in conjunction with sections 15 and 16, I cannot find any sufficient indication that it was intended to oust the jurisdiction of the court on any question which might have been made the subject of an application under section 17.

The section is permissive and not imperative. That in itself is not a circumstance of any positive weight (see the permissive language of the section in *Barraclough* v. *Brown*[25]); but the fact remains that it is not in terms made obligatory to apply under section 17, which is at least consistent with the company's contention.

Much more important is the circumstance that section 17 made its first appearance in planning legislation in the Act of 1947. In its absence the right now claimed by the company of going to the court for declaratory relief could hardly have been doubted. If the introduction of section 17 had been intended to change the law by ousting the jurisdiction of the court on questions capable of being dealt with under the section, that important change would surely have been made in express terms.

For the reasons I have stated I am of opinion that the preliminary objection fails.

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[23] [1897] A.C. 615.

[24] Ibid.

[25] Ibid.

This conclusion accords with the views expressed by McNair J. and the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*.[26] That was a case in which a person served with an enforcement notice under section 23 of the Act of 1947 did not avail himself of the right of appeal to a court of summary jurisdiction given by subsection (4) of section 23, but applied to the court for a declaration that the enforcement notice was invalid. It was held that he was not precluded by the statutory provisions from applying to the court for relief, and that he was entitled to the relief claimed.

On the footing that the court had jurisdiction to entertain the action, I think that the case was clearly one in which the company, if they made good their contentions on the merits, could properly be given declaratory relief: see *Vine* v. *National Dock Labour Board*.[27]

I may therefore now pass to the substantial issue in the case, namely, whether the company's quarrying operations constituted "development authorised by any local or private Act "of Parliament . . . which designates specifically both the "nature of the development thereby authorised and the land upon "which it may be carried out" within the meaning of Class XII in the First Schedule to the General Development Order of 1948.

It is not in dispute that if the company's quarrying operations were, within the meaning of Class XII, "authorised" by the Malvern Hills Acts, 1884 to 1924, the additional requirement that the nature of the development so authorised and the land upon which it might be carried out should be specifically designated by the legislation authorising it was satisfied in the present case.

The case therefore turns substantially on the question whether this development was so authorised.

I have so far referred collectively to the Malvern Hills Acts, 1884 to 1924. There were in fact three Acts passed respectively in 1884, 1909 and 1924. Of these the Act of 1909 contains nothing of any relevance to the present dispute, while the Act of 1884 calls for no more than a passing reference. The statutory authorisation of the company's quarrying operations is to be found, if anywhere, in the Act of 1924. The Act of 1884 provided for the appointment of conservators who were given divers powers designed to protect the amenities of the Malvern Hills, but these powers were found to be inadequate to provide the protection intended, and the position at the time of the passing of the Act of 1924 is thus described in the preamble to that enactment:

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[26] [1957] 2 Q.B. 136; [1958] 1 Q.B. 478; [1957] 2 W.L.R. 627; [1957] 3 W.L.R. 919; [1957] 1 All E.R. 825; [1957] 3 All E.R. 529.

[27] [1957] A.C. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939.

" And whereas in recent years the amenities of the Malvern " Hills have been seriously interfered with by quarrying opera- " tions and by the erection of buildings sheds machinery and " plant and those operations are being extended in such manner " as to threaten to destroy the value of the Malvern Hills as " objects of public interest as well as to impede the user and " enjoyment thereof for purposes of public recreation and wholly " to alter the state of the hills as they existed in the year one " thousand eight hundred and eighty-four:

" And whereas the powers of the existing Conservators are " insufficient to preserve the Malvern Hills from such quarrying " operations and to prevent the erection of such buildings sheds " machinery and plant as aforesaid and it is desirable that further " provision should be made for the acquisition by the existing " Conservators of the manorial and other rights over the Malvern " Hills and of other property or interest in the Malvern Hills " or any part thereof and that further powers of protecting " controlling and dealing with the Malvern Hills should be con- " ferred upon the existing Conservators as in this Act provided:

" And whereas it is expedient that the area of jurisdiction of " the existing Conservators should be enlarged and their con- " stitution altered as in this Act provided: . . . "

At the time of the passing of the Act of 1924 the company had for many years been operating granite quarries in the Malvern Hills, and at that time owned the freehold of the area known as the Tank Quarry and held leases or licences of the quarrying rights in additional areas lying to the south of the Tank Quarry area. It is unnecessary to discuss in detail the somewhat complicated history of these leases or licences.

The Act of 1924 must be referred to at some length.

Section 2 contains a number of definitions, including the following: " ' The Minister ' and ' The Ministry ' mean respec- " tively the Minister and the Ministry of Agriculture and Fisheries; " ' Revenues of the Conservators ' includes the revenues of the " Conservators from time to time arising from the Malvern Hills " or from any land or other property for the time being belonging " to the Conservators. . . . "

Section 5 reads: " 5. The area within the jurisdiction of the " Conservators for the purposes of this Act and the Acts of 1884

" and 1909 shall comprise the lands rights and interests described " in the First Second and Third Schedules to this Act together " with all lands common or waste over which the Conservators " now have or may hereafter acquire rights and interests all of " which are in this Act referred to as 'the Malvern Hills.'"

By section 7 (1) " . . . the existing Conservators as re-con- " stituted by this Act and their successors shall continue to be " a body corporate by the name of 'the Malvern Hills Con- " 'servators' . . . having power to hold and manage lands."

Section 20 provides that the Malvern Hills shall be regulated and managed by the conservators under and in accordance with that Act and the Acts of 1884 and 1909.

By section 21 the conservators are required to preserve the natural aspect of the Malvern Hills and protect trees, etc.

Sections 22 and 23 are in these terms: " 22.—(1) Notwith- " standing anything contained in the Acts of 1884 and 1909 the " Conservators are hereby authorised to purchase the whole or " any portions of the lands properties quarries manorial rights " and interests described in the Second and Third Schedules to " this Act and the owners thereof and other persons interested " therein shall sell the same subject and according to the pro- " visions of this Act and the Acts incorporated herewith.

" (2) In assessing the amount of compensation to be paid " under this Act to the owner of any quarry any obligations such " owner may be under in regard to his employees shall be taken " into account.

" 23. The powers of the Conservators for the compulsory " purchase of lands and other interests for the purposes of this " Act shall cease after the expiration of five years from the " thirty-first day of December one thousand nine hundred and " twenty-four."

By section 24 (1): " On the Conservators giving notice of " their intention to exercise their option to purchase the under- " taking of the Pyx Granite Company Limited . . . pursuant to " the heads of agreement set forth in the Fourth Schedule to " this Act the Conservators shall " make a certain deposit.

By section 25 (1) the conservators were empowered to make and enforce by-laws to regulate quarrying in, upon or under the Malvern Hills: and by section 25 (2) provision was made for the payment by the conservators of compensation to any owner, lessee or occupier injuriously affected by the operation of any by-law so made.

By section 26 (1) the Minister was empowered at any time on the application of the conservators and after holding a local inquiry to make an order or orders to prohibit quarrying upon any part of the Malvern Hills specified in such order or orders.

By section 26 (2) provision was made for the payment of compensation by the conservators to persons whose interests might be affected by such order.

By section 27 the Minister was empowered, after an application had been made to him by the conservators under section 26 and had not been withdrawn, to make a temporary order or temporary orders to prohibit quarrying on the lands to which such application related.

Section 54 provides as follows: " 54. For the protection of the " Pyx Granite Company Ltd. (in this section referred to as ' the " ' company ') the following provisions shall unless otherwise " agreed in writing between the company and the Conservators " and the Malvern Council have effect (that is to say): The " heads of agreement as set forth in the Fourth Schedule to this " Act are hereby confirmed and made binding on the company " and the Conservators and the Malvern Council and the provisions of this Act shall only apply to or affect the undertaking " property or rights of the company subject to the provisions of " the said heads of agreement."

The Second Schedule to the Act, headed " Lands and Quarries " authorised by this Act to be acquired by the Conservators," contains no reference to the Tank Quarry.

The Fourth Schedule to the Act, headed " Heads of Agree" ment between the Pyx Granite Company Limited and the " Conservators and the Malvern Urban District Council," includes the following provisions: " 1. The company's rights of " quarrying to be limited (outside their freehold property) to " the quarryable area at North Malvern defined on a plan to be " signed by the Right Honourable the Lord Islington the Chair" man of the Committee of the House of Lords to whom the " Bill is referred a copy of which is to be supplied by the Con" servators to the company. 2. The company to surrender the " remaining area held by them under the Gandolfi Licences but " to be at liberty to work under the Berington Lease until it " expires. That lease is not to be renewed. 3. The Malvern " Urban District Council (hereinafter referred to as ' the council ') " to transfer to the company their interest as lessees or tenants " of the two quarries at North Malvern which they hold and " the company to purchase by agreement or by valuation the

" plant and machinery of the council now there. 4. The company " to supply the council with all stone they require for repair of " roads in their area at 7s. 9d. per ton at the quarry subject to " variation of price according to variations in wages. 5. The " council to extend the company's existing licences so far as " they affect the areas which the company may under clause 1 " work to the twenty-fourth June one thousand nine hundred " and sixty on the same terms as at present affect such areas " respectively under the present licences. 6. The conservators " and the council to arrange for the grant to the company of a " licence to work the present council's quarries within the area " mentioned in clause 1 to the twenty-fourth June one thousand " nine hundred and sixty on the terms of the existing 1910 licence " so far as applicable.

. . . .

" 10. The company to exclude from its operations the play- " ground hatched black on the plan and not to affect injuriously " the existing reservoir and aqueduct on the land numbered 10 " on the deposited plan in the parish of Malvern.

" 11. The Conservators to be at liberty to plant trees on the " disused quarry dumps at the North Malvern quarries the work " to be done to the satisfaction of the company.

" 12. The Conservators to have an option to purchase the " company's undertaking as a going concern at the expiration of " two years after written notice of such intention shall have been " given to the company during the third fourth or fifth year after " the passing of the Bill.

. . . .

" 14. A clause to be inserted in the Bill excluding the under- " taking property and rights of the company from its operation " except that bye-laws may be made with the approval of the " Home Secretary (after notice to the company) in regard only " to blasting operations in the company's quarries for the pro- " tection of the public.

" 15. The company to be at liberty to continue working under " the existing licences without restriction until the new licences " above mentioned are granted.

. . . .

" 17. The company shall be at liberty to make and use a " tunnel fifteen feet wide and ten feet high under the area of " land dividing their freehold property from the council's quarries "at a point above the reservoir of the council to be agreed "between the Conservators and the council in accordance with "plans to be approved by their respective surveyors and regulations to be made by the council for the protection of the public.

"18. These provisions to be inserted in an agreement which "shall contain an arbitration clause and to be executed in "triplicate such agreement in case of difference to be settled by "a conveyancing counsel to be agreed upon between the company and the conservators or failing such agreement to be "nominated by the President of the Incorporated Law Society."

These are, I think, all the provisions of the Act of 1924 to which it is necessary to refer for the present purpose.

Reserving for later consideration the position in regard to the Tank Quarry, as to which a special question arises, it appears to me to be reasonably plain that if the heads of agreement in the Fourth Schedule are to be looked on as taking effect by virtue of the Act, and not merely by virtue of a contract between the parties recorded in the Act but having no statutory force, the Act did authorise the development by quarrying operations of the quarryable area as defined in paragraph 1 of the heads of agreement, and the plan therein referred to, including as part of that area the leasehold interests to be purchased from the Urban District Council under paragraph 3. Paragraph 1, by limiting the company's rights of quarrying to that area, must, I should have thought, be taken by necessary implication to have authorised them to quarry within it.

This view is, to my mind, borne out by a consideration of the Act as a whole. Its object may be shortly described as being to preserve the amenities of the Malvern Hills, and in particular to preserve them from the inroads of quarrying. To that end the conservators were given considerable powers, including the power of making by-laws under section 25, and were enabled to invoke the power of the Minister to make orders prohibiting quarrying operations altogether under sections 26 and 27. The company might have been subjected, like other quarry owners in the Malvern Hills, to these restrictive provisions. But, owing no doubt to their opposition to the Bill, they were accorded special treatment. This was done by means of section 54 and the heads of agreement in the Fourth Schedule. Section 54, expressed to be for the protection of the company, enacted that unless otherwise agreed in writing between the company, the Conservators and the Malvern Council, the following provisions should have effect; and went on to provide that the heads of agreement in the Fourth Schedule were thereby confirmed and made binding on the same three parties, and that the provisions of the Act should only apply to or affect the undertaking, property or rights of the company subject to the provisions of the said heads of agreement. Turning to those heads of agreement one finds that by paragraph 1 they limit the company's rights of quarrying to the quarryable area defined in the plan, include in such area the quarries, the leasehold interest of the Urban District Council in which was to be purchased by the company under paragraph 3, and provide, by paragraph 2, that the company shall surrender the remaining area held by the company under the Gandolfi Licences, which apart from the Berington Lease, which we were invited to ignore, may be taken as including the whole of the land over which the company had rights of quarrying as licensees outside the permitted area. Then under paragraphs 5 and 6 provision is made for the extension of the company's existing licences so far as they affect the areas which the company may work under paragraph 1 to June 24, 1960, and the grant of a licence expiring on the same date to work "the present council's quarries" (sc: "the Council's present "quarries") within the permitted area. Thus the company, in exchange for their exemption from the restrictive provisions of the Act, the recognition of their right to work within the area shown on the plan, including as part of such area the leasehold interests to be acquired from the Urban District Council, and the extension of such rights until 1960, gave up their right to work the remainder of the land held by them under the Gandolfi Licences, submitted to the grant to the conservators of an option to purchase their undertaking under paragraphs 12 and 13, and furthermore submitted to the imposition of a number of stipulations to be observed and performed by the company for the protection of the public and the preservation of amenities.

Viewing these arrangements as a whole, it appears to me that they did, according to the ordinary meaning of the word, authorise the company to work within the limits prescribed by paragraph 1. Apart from section 54 and the heads of agreement the company would have been exposed to the risk of their quarries being closed down by an order of the Minister under section 26. They were, as I think, relieved of that risk and given security of tenure by section 54 and the heads of agreement upon the terms specified in the heads of agreement. That, in my view, amounted to authorisation of their quarrying operations within the reduced area allowed to them. In his most helpful judgment

Morris L.J. referred [28] to the dictionary definition of "to authorise" cited by Tomlin J. (as he then was) in *Evans* v. *E. Hulton & Co. Ltd.*,[29] "to give formal approval to, to sanction, "approve, countenance." Any one of these equivalents would, in my view, be apposite here.

The main arguments against the view that the development here in question was authorised by the Act of 1924 are two. The first is that the heads of agreement were merely contractual in their operation, so that the authorisation, if any, in this case did not satisfy the requirement in Class XII of the First Schedule to the General Development Order of 1948, because the development if authorised at all was not authorised by "any local or "private Act of Parliament." This argument, which commended itself to Lord Denning, is founded upon *Reg.* v. *Midland Railway Co.*,[30] but that appears to me to have been a very different case from this. In that case an agreement concluded between two railway companies contained a provision for arbitration in manner provided by the Railway Companies Arbitration Act, 1859. Later a private Act of Parliament was passed, and this Act scheduled the agreement and provided that it should be "confirmed and "made binding" upon the parties thereto. Disputes having arisen, one of the companies concerned applied to the Railway Commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. Objection was taken to the jurisdiction, and the objection succeeded, on the ground that the right to refer differences to arbitration was derived from the agreement itself; and that the difference was not "required or authorised to be referred to arbitration" under the provisions of any general or special Act within the meaning of the Act of 1873; and consequently that the Railway Commissioners had no jurisdiction to entertain the application.

It is to be observed that in that case there was by virtue of the agreement a valid contractual arbitration clause, before the private Act was ever passed. In the present case no concluded agreement had been entered into before the passing of the Act. The heads of agreement were not binding on anyone until the Act had been passed, and their terms were plainly such that when the Act was passed they could have no contractual validity independently of the Act. If section 54 and the Fourth Schedule had not been included in the Act it is reasonably plain that a contract in the terms of the heads of agreement in derogation of the terms of the Act could not have been validly made. I respectfully adopt the words of Romer J. (as he then was) in the unreported case of *Pyx Granite Co. Ltd.* v. *Malvern Hills Conservators and the Malvern Urban District Council*[31] where he said: "The parties only became bound by the heads of agreement by virtue of the express provisions to that effect in "section 54 of the Act and the heads of agreement were in "this way made part of the Act." For these reasons I am of opinion that the argument that any authorisation given was not given by the Act, but merely rested in contract, fails.

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[28] [1958] 1 Q.B. 554, 587.

[29] (1924) 131 L.T. 534, 535.

[30] 19 Q.B.D. 540.

I should add that I see nothing to displace this conclusion in the words "unless otherwise agreed in writing" which occur in section 54. Those words, to my mind, merely indicate that the statutory protection afforded to the company may be relinquished by the company wholly or in part if the company, the conservators and the council so agree, and do not deprive such protection of its statutory character.

The other main argument against the view that the development here was "authorised" within Class XII is to the effect that the Act did not authorise the company to do anything which they were not entitled to do before it was passed. Before the Act was passed they were entitled to quarry on any lands owned by them or in which they had or might be able to obtain licences to quarry. After the Act was passed their rights of quarrying were restricted in manner provided by section 54 and the Fourth Schedule, but they were given no new rights save in so far as they acquired the leasehold interest of the council in the quarries mentioned in paragraph 3 of the Fourth Schedule, which were included in the permitted area.

I think this argument takes too narrow a view. When the Bill which became the Act of 1924 was in the process of passing into law, prevention of quarrying was, so to speak, in the air. The legislature must be taken to have had under consideration the whole question of quarrying in relation to its effect on the amenities of the Malvern Hills, and the extent of the restrictions on the former which it would be reasonable and practicable to impose in the interests of the latter. The Act when it emerged could theoretically have stopped quarrying altogether, or subjected it to restrictions of any degree of severity as the legislature might think fit. In such circumstances I think it is right to regard an owner or licensee of quarry lands who is permitted by the Act to quarry without restriction part of his quarryable lands on condition that he gives up quarrying the rest, as authorised by the Act to quarry (albeit in right of his interest as owner or lessee) that part of his lands which the legislature permits him to quarry.

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[31] Unreported (1925 P. No. 142).

Accordingly I think this argument fails also.

A subsidiary argument arises with respect to the Tank Quarry, the company's own freehold. The difficulty here is this. Section 5 defines " The area within the jurisdiction of the Conservators " for the purposes of this Act . . . " by saying that it shall comprise the lands, rights and interests described in the First, Second and Third Schedules to the Act together with all lands common or waste over which the Conservators " now have or " may hereafter acquire rights and interests all of which are in " this Act referred to as 'the Malvern Hills.' " The First Schedule, " Property vested in the Conservators," and the Third Schedule, " Manorial Rights authorised by this Act to be acquired " by the Conservators," clearly have no reference to the Tank Quarry. But the Second Schedule, " Lands and Quarries authorised by this Act to be acquired by the Conservators," in which one would expect to find the Tank Quarry, contains no mention of it, although it does include other land held by the company as licensees. Passing to the Fourth Schedule, it appears that the only references to the Tank Quarry in that Schedule consist of the words in brackets " (outside their freehold property) " in paragraph 1, and of the provision in paragraph 17 enabling the company to make a tunnel under the area of land dividing their freehold quarry from the council's quarries.

It is, accordingly, suggested that the Tank Quarry is not included in the area within the jurisdiction of the conservators as defined in section 5 of the Act, and not included in the quarryable area defined in paragraph 1 of the Fourth Schedule, and, accordingly, that the Act cannot be held to have authorised quarrying upon it.

This is a troublesome point, but I have come to the conclusion that the Tank Quarry must be taken to be included in the area of the conservators' jurisdiction, and also to be included in the quarryable area as defined in paragraph 1 of the Fourth Schedule for the following reasons: Section 5 of the Act defines the area of the conservators' jurisdiction as comprising not merely the scheduled items but also " all lands common or waste over which the

"Conservators now have or may hereafter acquire rights and "interests." I construe these words as including "all lands, or "common, or waste" and not "all common or waste lands." Paragraph 12 of the heads of agreement gives the conservators an option to purchase the company's undertaking as a going concern on the terms stated in that paragraph and in paragraph 13, this option being also referred to in section 24 of the Act. Clearly, the company's undertaking must be taken as including the Tank Quarry. An option to purchase confers on the grantee of the option an interest in the property to which the option relates. Accordingly, in my opinion the Tank Quarry is included in the area of the conservators' jurisdiction under section 5, as falling within the expression "all lands . . . over which the Conservators "now have or may hereafter acquire rights and interests." With respect to paragraph 1 of the Fourth Schedule, I regard the expression "(outside their own freehold)" as of somewhat doubtful import, but as being well capable of meaning "apart "from their freehold property" or "over and above their freehold "property," so that the permitted area extends to their freehold property as well as to the other property shown on the plan as comprised in the quarryable area. I think this construction should be adopted, particularly in view of the apparent absurdity of omitting the Tank Quarry. This conclusion is, to my mind, aided by the fact that the option given to the conservators is an option to purchase the company's undertaking as a going concern. That surely imports an intention that the working of the Tank Quarry would in the meantime continue. The provisions in paragraph 17 of the Fourth Schedule as to the making of the tunnel also appear to me to import the intention that the Tank Quarry should be worked. The fact that the option was never exercised does not, in my view, affect its bearing upon the construction of the Act.

I should perhaps add a word about the unreported case already referred to. The decision of the Court of Appeal[32] was to the effect that paragraph 14 of the heads of agreement was inoperative. The judgments are not altogether easy to follow, but if and so far as they involve the conclusion that notwithstanding section 54, enacted as it was for the protection of the company, by-laws made under section 25 would bind the company, however inconsistent they might be with the quarrying within the permitted area conferred on the company without qualification by

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[32] Unreported, June 24, 1925.

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the Fourth Schedule, or that notwithstanding section 54, an order could be made by the Minister under section 26 or section 27 prohibiting further quarrying by the company within the permitted area, I cannot agree with them.

I find it unnecessary to discuss the agreement of December 14, 1925, made in pursuance, or purported pursuance, of paragraph 18 of the heads of agreement. To my mind, the solution of the question of authorisation by the Act of 1924 is to be found in the Act itself, including as part of the Act the heads of agreement.

It follows from the views above expressed that, in my opinion, the difficult questions as to the propriety of the conditions attached to the permission given by the Minister under the Act of 1947, on the assumption that he was in a position to give any effective permission at all, and as to the appropriate remedy on the footing that the conditions were bad, which were fully and ably argued before your Lordships, do not arise, and I express no opinion about them one way or the other.

For these reasons I would allow this appeal.

Appeal allowed with costs.

Solicitors: *Stephenson, Harwood & Tatham; Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcester.*

J. A. G.

J. C.*
1960
Jan. 19.

KHATIJABAI JIWA HASHAM . . . APPELLANT;

AND

ZENAB (AS LEGAL REPRESENTATIVE OF H. G. HARJI) . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Vendor and Purchaser—Specific performance—Premature action—Signed contract for sale of land—Immediate repudiation by vendor—Claim by purchaser, before date fixed for completion, for order for specific performance—Principles applicable—Form of order.

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

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Eastern Africa—Kenya—Vendor and purchaser—Contract for sale of land—Specific performance.

Privy Council—Concurrent findings of fact—Exception to rule—Conflict of evidence—Improbability of finding—Importance of contemporary documents (post, pp. 334, 335).

Contract — Mistake — Unilateral — Innocent misrepresentation (post, p. 334).

Estoppel—Deed, by—Non est factum—Fraud or duress—No false statement (post, p. 335).

A contract, signed by the defendant on February 19, 1954, for the sale by her to the plaintiff of a 2-acre plot of land in Nairobi, provided, inter alia, for payment of a deposit immediately and the balance of the purchase price on presentation of documents of title to be executed by both parties within six months from the date of the contract. The defendant repudiated the contract—and tore it up—within a few minutes of signing it on the ground that she had never agreed to sell the whole 2 acres but only an area of half an acre. On July 2, 1954, some weeks before the last day for completion—August 19—the plaintiff instituted proceedings claiming specific performance of the contract of February 19. The defendant contended, inter alia, that the plaint was issued prematurely, and that the plaintiff should have waited until there had been a failure to perform the contract within the period fixed thereby, notwithstanding that she had previously intimated her refusal to do so:—

Held, that the plaintiff was entitled to an order for specific performance. The fallacy of the defendant's contention consisted in equating the right to sue for specific performance with a cause of action at law. In equity all that was required was to show circumstances which would justify the intervention by a court of equity. The order for specific performance often fell into two parts, the first being of a declaratory nature and the second containing consequential directions. The first of the forms in Seton's Judgments and Orders, 7th ed., vol. 3, p. 2136, was clearly suitable to a case where the time for performance might not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court would not, of course, compel a party to perform his contract before the contract date arrived, and would give relief from any order in the event of an intervening circumstance frustrating the contract.

While the defendant's contention was not supported by any authority, there was no express decision in any English case to the contrary, but the view that the plaintiff was entitled to an order for specific performance accorded with the decisions in the Canadian cases of *Roberto* v. *Bumb* [1943] 2 D.L.R. 613 and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.* [1951] 3 D.L.R. 122, affirmed in [1952] 1 D.L.R. 158, and by the Supreme Court of Canada in [1952] 2 S.C.R.(Can.) 465. There was nothing in the Indian Contract Act (applicable in Kenya) to compel acceptance of the contrary view (post, p. 329 et seq.).

Dictum of Lord Sumner in *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C. 851, at 866; 40 T.L.R. 745 not followed.

Marks v. *Lilley* [1959] 1 W.L.R. 749, 752; [1959] 2 All E.R. 647 considered.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 29 of 1957) from a judgment of the Court of Appeal for Eastern Africa (Sinclair V.-P., Briggs J.A. and Connell J.) (March 15, 1957) affirming a judgment of the Supreme Court of Kenya (Harley Ag.J.) (January 13, 1956) whereby specific performance by the appellant of a contract in writing dated February 19, 1954, between the appellant and Haji Gulamhussein Harji for the sale by the appellant of a plot of land in Nairobi was decreed at the suit of the said Harji.

The respondent was the widow and executrix of Harji, since deceased. The parties to the proceedings in the courts in East Africa will be referred to as plaintiff and defendant.

The contract sued upon was for the sale by the defendant of a plot, No. 209/58/1, measure 2·04 acres or thereabouts, together with all the buildings thereon situate on Sclatters Road, Nairobi, in complete vacant possession for the sum of Shs. 100,000 payable as to Shs. 15,000 on the execution of the contract and the balance on presentation of documents of title to be executed by both parties within six months from the date of the agreement. This contract was signed by the defendant on February 19, 1954, but was repudiated by her within a few minutes of signature on the ground that she had never agreed to sell the whole 2-acre plot but only an area of half an acre.

On July 2, 1954, between six and seven weeks before the last day for completion, viz., August 19, the plaintiff issued his plaint.

It was contended on behalf of the defendant that the plaint was issued prematurely, on the ground that the plaintiff, having elected to affirm the contract (instead of treating the anticipatory breach as putting an end to it so far as the future obligations of either party were concerned), kept it in being for all purposes, and the anticipatory breach by the defendant (which would, if accepted as a breach, have afforded a cause of action for damages) would not avail the plaintiff to support a claim for specific performance. He must wait until there had been a failure to perform the contract within the period fixed thereby, notwithstanding that the defendant had previously intimated her refusal to do so.

The further facts are stated in the judgment of the Judicial Committee.

1959. Nov. 23, 24, 25, 26, 30; Dec. 1, 2. *Sir Frank Soskice Q.C.* and *Alan Campbell* for the appellant. There are three points: (1) A pure question of law; completion was to take place by August 19, 1954; the plaint was filed on July 2, 1954, and the first question is whether in those circumstances the action for specific performance was premature. There was here on February 19, 1954, when the contract was signed by the defendant, conduct on her part which might well be regarded as an anticipatory breach—she tore up the agreement she had signed. On the authorities once one party is guilty of an anticipatory breach of an executory contract the other party, the promisee, is put to his election; he may either elect to treat the breach as something which brings the contract to an end entirely so far as the further obligations of either party are concerned, leaving it solely in existence in so far as is necessary for the purposes of quantifying damages; or he may elect to affirm the contract, keeping it in being for the purposes of future obligations of both the promisor and himself. If he elects to treat the contract as still in being, it remains in being for all purposes; that does not mean that a promisee must treat the anticipatory breach as not being a breach at all; by electing to keep the contract in being a promisee is saying that he does not treat an anticipatory breach as one going to the root of the contract. Support for that proposition is to be found in *Hochster* v. *De La Tour*,[1] *Frost* v. *Knight*[2] and *Johnstone* v. *Milling*.[3] If that proposition is made good the defendant here does not necessarily succeed, because a second proposition must be established which arises in this way; in the case in which the promisee has elected to affirm the contract he cannot sue for damages for failure to perform one of the obligations in the contract until the time stipulated in the contract for performance has gone by without performance. The question, however, is whether the same considerations apply where the remedy of specific performance is being sought. In other words, will the court grant a decree of specific performance in a case in which no complete cause of action for damages can be shown to exist?

As to that question, there are cases in which a court of equity has decreed specific performance where it could not be shown that a complete cause of action for damages existed, but it would appear on examination of the court's jurisdiction as formulated in the cases that they were all cases in which what prevented the existence of a complete cause of action for damages was some circumstance, whether resulting from some procedural defect or some general doctrine, which prevented the contract in question from being one which would be enforced in a court of law. That, it is submitted, is the result of the cases. In favour of the contention for the defendant in the present case—that specific performance could not be decreed—is a direct statement by Lord Sumner in his dissenting judgment in *Leeds Industrial Co-operative Society Ltd.* v. *Slack*[4] that "So far as specific performance "is concerned, they must always be cases where there has been "an anticipatory breach." In the present case there was no relevant breach and therefore the court's jurisdiction to grant specific performance has not been brought into play. [Reference was made to Fry on Specific Performance, 6th ed., paras. 47–60, and to Williams on Vendor and Purchaser, 4th ed., vol. 2, p. 1001, and the cases in note (*e*).] Of those cases, *Bettesworth* v. *Dean and Chapter of St. Paul's, London*,[5] is referred to in paragraph 60 of Fry—it is difficult to know what the case decides. *Bass* v. *Clivley*[6] does not carry the matter a great deal further. *Cannel* v. *Buckle*[7] explains the passages in Williams—it is a very strong case. Lastly, *Lennon* v. *Napper*,[8] so far as it goes, seems to support the proposition contended for on behalf of the defendant here. Halsbury's Laws of England, 3rd ed., vol. 14, p. 472, para. 897, neither contradicts nor affirms what has been submitted. [On anticipatory breach reference was also made to Williston on Contracts, vol. 5 (rev. ed.), pp. 3707–3709, paras. 1308–1311.]

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[1] (1853) 2 E. & B. 678.

[2] (1872) L.R. 7 Ex. 111.

[3] (1886) 16 Q.B.D. 460.

The above are the sources, and it is submitted that the proposition stands. After all, equity was brought in to give relief where legal relief was inadequate. Halsbury, 2nd ed., vol. 31, p. 329, para. 360, does not carry the matter any further. One cannot successfully ask for specific performance except for an obligation which has been broken; no relevant obligation has been broken here. The courts below founded on two Canadian cases, both of which are against the defendant here: *Roberto* v. *Bumb*,[9] in which it was said: "I think a court of equity would not permit "an appellant to avoid the contract merely because the action "was started prematurely, nor would the respondent be thus

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[4] [1924] A.C. 851, 866; 40 T.L.R. 745.

[5] (1728) 1 Bro.P.C. 240, 244, 249.

[6] (1829) Taml. 80.

[7] (1724) 2 P.W. 243.

[8] (1802) 2 Sch. & Lef. 682.

[9] [1943] 2 D.L.R. 613, 620.

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"deprived of his equitable right to a decree of specific perform-"ance, if he were otherwise entitled to it." That states the conclusion the judge came to without, however, justifying by process of reasoning the steps by which the conclusion was reached. The second Canadian case, *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.*,[10] which was affirmed on appeal, is to the same effect. If Vaisey J.'s tentative view in *Marks* v. *Lilley*[11] is well founded, it does not injure the defendant here at all. The distinction is emphasised between a declaration and a decree for specific performance; a declaration can be made in all sorts of circumstances and simply expresses the court's opinion. The approach of the Supreme Court of Canada was mistaken, it is submitted, in so far as it did not bear in mind the difference between relief by way of declaration and by specific performance. The court will not order specific performance unless there is somebody who is under a present duty to perform. That proposition remains unshaken by the authorities to which reference has been made. The action for specific performance was premature.

(2) The second point is that here there is a plain case of mistake—the defendant was completely mistaken as to the identity of the subject-matter of the contract. The evidence demonstrates clearly that the plaintiff may well have thought that he was buying the whole of the plot; it is equally clear on the evidence that the defendant—a widow aged 60, who could only speak Gujerati—when confronted with English documents thought that she was only disposing of one of those properties. She tore the agreement up, and the inference should be drawn that she suddenly discovered that she was selling something which she had no intention to sell: this is a clear case of mistake as to identity, and *Webster* v. *Cecil*[12] is prayed in aid. Snell's Principles of Equity, 24th ed., p. 549, para. 3, states the effect of the doctrine of mistake; "mistake," it is there said, "may be "of such a nature as to preclude that assensus ad idem which is "required in every contract, and so render the seeming contract "no contract at all. Such a mistake is clearly a good defence "to an action for specific performance, for it would be a complete "answer to a claim for damages." The Vice-President in his judgment in the court below said in effect that this is either

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[10] [1951] 3 D.L.R. 122, 129; [1952] 1 D.L.R. 158; [1952] 2 S.C.R.(Can.) 465, 471, 476.

[11] [1959] 1 W.L.R. 749, 752; [1959] 2 All E.R. 647.

[12] (1861) 30 Beav. 62, 64.

a case of fraud or there is no defence. That will involve an examination of the cases on mistake. It is not sought to say that there was fraud here; there are all sorts of possibilities short of deliberate fraud. The case has to be decided on the balance of probabilities. It is submitted that the defendant should succeed even if every fact in the case is found against her, for on the evidence there was no concluded contract—it was never signed by the plaintiff. The court is being asked to decide the case on a sort of hypothetical plea. The decree is to enforce specific performance of a contract which is not there. In the circumstances it is just that the defendant should be allowed to take this point now.

In considering whether parties are thinking of entirely different things, the test is one of degree. The general principles in regard to " mistake " are set out in Chitty on Contracts, 21st ed., p. 227, para. 415; and see paras. 417, 418 and 422. As to " non est " factum," Chitty at p. 314, in para. 602, stated: " The defence " now under discussion arises where a party has been misled " either by fraud or otherwise . . . into either executing a deed " or signing a document other than he intended to execute or sign " or other than he imagined he was executing or signing." That is the correct and general principle and, despite the defendant's signature on the document, there is a non est factum case here. The doctrine of estoppel does not prohibit the defendant from raising as a defence that her mind did not go with the transaction. Alternatively, if the doctrine of estoppel can even apply to prevent a party relying on a mistake which is of substance, then it is submitted that here there are not materials for estoppel. [Reference was made to *Blay* v. *Pollard and Morris*,[13] *L'Estrange* v. *F. Graucob Ltd.*,[14] *Solle* v. *Butcher*,[15] *Bell* v. *Lever Brothers Ltd.*[16] and *Foster* v. *Mackinnon*.[17]] The last-cited case is a true case of non est factum, and that defence can only be defeated, if at all, by estoppel; reliance is placed on what Byles J. said in that case [18]: " It seems plain, on principle and on authority, that, if " a blind man, or a man who cannot read . . . has a written con- " tract falsely read over to him . . . which the blind or illiterate " man afterwards signs, then, at least if there be no negligence, " the signature so obtained is of no force . . . and it is invalid . . .

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[13] [1930] 1 K.B. 628, 632.

[14] [1934] 2 K.B. 394, 399.

[15] [1950] 1 K.B. 671, 692; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[16] [1932] A.C. 161, 217; 48 T.L.R. 133.

[17] (1869) L.R. 4 C.P. 704.

[18] Ibid. 711.

"on the ground that the mind of the signor did not accompany "the signature; in other words, that he never intended to sign, "and therefore in contemplation of law never did sign, the con-"tract to which his name is appended." In the present case there was a mistake as to the subject-matter and the defence of non est factum arises. [Reference was also made to Chitty on Contracts, 21st ed., pp. 316, 603, and to *Hunter* v. *Walters*.[19]] This Board is in no worse a position than the Court of Appeal below to review the evidence.

(3) The third and last point is that the remedy by way of specific performance is discretionary in the sense that the court, in deciding whether or not to make a decree, looks at all the circumstances. Here the defendant was an illiterate Gujerati woman who could not understand these documents; she had nobody to advise her; and, perhaps the most important element, the trial judge and the Court of Appeal were both of opinion that the plaintiff had given false evidence. It is also a material circumstance that the defendant is being asked to dispose for a lesser value something of a much greater value. Further, on any view of the matter one is uncertain what the contract is. Nothing has been disclosed to indicate that damages would not be a sufficient remedy.

Alan Campbell following. On the contention that the action was premature there are seven submissions: (1) The right to institute a suit for specific performance before the time for completion arose must have existed before the Judicature Act in order to enable the courts to give effect to it now. (2) There is no decision to show that such right existed before the Judicature Act; indeed, the whole historical background leads one to the contrary conclusion—it is clear that one must first sue out for damages at common law after the time for performance, and then go to the equity court for a decree of specific performance based on the establishment of the legal right in the common law courts. (3) If any chancery practice has developed to the contrary, it is a wrong and invalid practice, and this Board should so rule. (4) There is no precedent in any textbook or authority for the grant of conditional decrees of specific performance which put the parties on terms. (5) There is nothing in the Rules of Court in England to allow causes of action to be instituted which did not exist at the date of the writ: see *Eshelby* v. *Federated European Bank*[20] and The Annual Practice, 1960, p. 627. (6) The development of the chancery practice as to declaratory orders arises under Order 25, r. 5. (7) In Kenya the position is a fortiori because there is an express rule, Order VII, r. 1 (e), of the Kenya Civil Procedure Code, which is mandatory, which is taken from the Indian Civil Procedure Code, which has been strictly applied, and which provides that "The plaint shall contain the following "particulars:— . . . (e) the facts constituting the cause of action "and when it arose." The plaintiff should include in his plaint all existing grounds on which the suit can be based, and is only entitled to succeed on the cause of action alleged by him in his plaint. Since at the time when the plaintiff's suit was instituted the time for performance had not arrived, the defendant submits that, as a matter of procedure as well as of substantive law, the action was premature. [Reference was made to *U Ba Maung* v. *U Chit Hlaing* [21] and *Smith* v. *Heptonstall.*[22]]

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[19] (1871) L.R. 7 Ch. 75, 88.

[20] [1932] 1 K.B. 254.

The Canadian cases do not assist at all; the judges in Canada were not coming to grips with the problem as it arises before the Board today. On analysis those cases—*Roberto* v. *Bumb* [23] and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.*[24] —are not against the defendant here, and the Board should consider the matter unfettered and free from them. One's action at common law must be complete before one can sue out in equity: *Salt* v. *Cooper* [25]; and in *Wilson* v. *Northampton and Banbury Junction Railway Co.*[26] Lord Selborne L.C. to some degree pays service to the same concept. Both on the merits and on the technical point the defendant should succeed. There was no sufficient adjudication on the issue of mistake or non est factum. Upon a proper adjudication on that issue it should be held on the evidence that such mistake or absence of consent existed as to preclude the formation of any contract.

Geoffrey Cross Q.C. and *Ralph Millner* for the respondent. First, on the point that the action was premature, the proposition for the defendant was that when one party to a contract repudiates it before the time for performance has arrived, and the other party elects not to accept the repudiation, the court has no jurisdiction to make an order for specific performance at the instance of the latter party if he issues his writ before the time for performance arrives, even if the case is not itself heard until after that date. It is submitted that there is no basis for that proposition as a matter of principle, and that it is not supported by authority.

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[21] A.I.R. (1941) Rang. 27.

[22] A.I.R. (1938) Rang. 134.

[23] [1943] 2 D.L.R. 613, 620.

[24] [1952] 2 S.C.R.(Can.) 465.

[25] (1880) 16 Ch.D. 541, 552.

[26] (1873) L.R. 9 Ch. 279, 285.

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On the question of principle, it appeared to be conceded for the defendant, first, that the court can make a declaration that the contract is binding, and, secondly, that the court can grant an injunction preventing a vendor from disposing of the property pending the time for performance of the contract. There is no immediate finality about an order for specific performance; there are really two parts to specific performance. There is no reason in principle why, when a contract has been repudiated, the court should not at the instance of the other party, first make an order for specific performance—make the declaration that the contract ought to be specifically performed and carried into execution; if the time of performance had not yet arisen, that would be the easiest thing in the world; and, secondly, it would not at the moment make any consequential directions, but each party would have liberty to apply for consequential directions when the time for performance arrived. The second submission on principle is that the argument for the defendant is wrong in equating the right to sue for specific performance with a cause of action at law for damages. Here there was a plain repudiation on which one can sue at law, so the plaintiff is in a stronger position.

With regard to authority, there is, it would appear, no English case in favour of the defendant's proposition except the dictum of Lord Sumner in his dissenting judgment in *Leeds Industrial Co-operative Society Ltd.* v. *Slack*,[27] but it is clear that Lord Sumner had not the present point in mind at all. One has against the defendant's proposition the view of Cyprian Williams expressed twice—in his Vendor and Purchaser, 4th ed., p. 1001, and in his Contract of Sale of Land, pp. 119–124—which, in the absence of English authorities, is entitled to considerable respect: there is also the view of Vaisey J. in *Marks* v. *Lilley*.[28] In the absence of anything more definite those two expressions of opinion are entitled to considerable weight. Outside England there is a world of authority, and the two Canadian cases which have been cited are directly in point here. The attempt to distinguish them on the terms of the Judicature Acts is not well founded. [Reference was also made to Williston on Contracts, vol. 5, pp. 3707–3709, paras. 1308–1311, and to the American Restatement of the Law of Contract, vol. 2, para. 360.]

Therefore, both as matter of principle and as matter of authority the first point of law that the action was premature is ill founded.

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[27] [1924] A.C. 851, 866.

[28] [1959] 1 W.L.R. 749, 752.

Next, with regard to the point taken for the defendant which was not raised in the case at all—that there was here no binding contract because the plaintiff never signed it—it is submitted that in view of the way in which the case proceeded below the defendant cannot now take the point that there was no agreement, and that the appeal must be conducted on the footing that there was a contract prima facie binding on the defendant and that the only question is whether she could for one reason or another get out of it. On taking a point on appeal which was not taken below, see *Connecticut Fire Insurance Co.* v. *Kavanagh.*[29]

On the footing that there was a concluded contract prima facie binding on the defendant, the question is whether she can get out of it on the ground of mistake or non est factum; she abandoned the contention of undue influence, she abandoned the contention of subsequent rescission, and she failed on the question of fraudulent misrepresentation, and her counsel does not seek to challenge the concurrent findings on that. The case must be approached on the footing that the plaintiff was not guilty of any fraud or dishonesty in the negotiations preceding the conclusion of the agreement.

The answer for the plaintiff on the mistake and non est factum point is two-fold: (1) On the facts, the evidence is very far from showing that the defendant was mistaken; (2) in law, it would make no difference whatever if she was. With regard, first, to non est factum, that plea is available when one party is induced by the untrue representation of another (in practice it is always a fraudulent representation) to execute a document which he believes to be of one character but is in truth of a quite different character. The plea of non est factum is not available in this case for two reasons: (i) because it is not now suggested—though it was in the pleading—that the defendant executed a document on the faith of any untrue representation made by the plaintiff or by anyone else as to the amount of property comprised in it; (ii) because even if she had been so induced, it was not, or it would not have been, a document of a totally different character from what it was represented to be. On those grounds the plea is not available here: see *Howatson* v. *Webb.*[30] Non est factum is a legal pleading that the document is a nullity—void, not voidable. That becomes very important where innocent third parties are concerned. There are two requisites; there must be some false statement, not necessarily fraudulent; and it must be as to the nature as opposed to the contents of the deed. The latter, it is conceded, must be a question of degree in different cases. As to the necessity for some erroneous statement; the plea does not apply in a case where a man who does not understand the language, and there are people present who could translate it to him, chooses for some reason not to want it read. There is no case which suggests that the plea of non est factum can be supported in the absence of some erroneous statement as to the character of the deed. Here there was no erroneous statement at all, and the question of the character of the deed does not arise.

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[29] [1892] A.C. 473; 8 T.L.R. 752.

[30] [1907] 1 Ch. 537, 543; [1908] 1 Ch. 1.

Turning to the question of mistake and the equitable cases about that, the first submission is that this is not a case of common mistake, such as *Bell* v. *Lever Brothers Ltd.*[31] and *Solle* v. *Butcher*,[32] in which both parties had an erroneous view of the facts. Here, assuming that the defendant was mistaken, the case is one of two people at cross-purposes—not where both were labouring under the same mistake; and in the cases of cross-purposes cases, when the contract is not ambiguous the bulk of the equity cases say that the party who is mistaken as to its meaning cannot have it set aside against the other party unless he confirms that he has in some way been misled by the other party, not necessarily fraudulently—it may be innocently. If the position is that he has only himself to blame, then he cannot succeed: *Tamplin* v. *James*.[33] The defendant could not have the contract voided and get out of paying damages if the fact was that she did not choose to have it read to her. *Webster* v. *Cecil*[34] has always been treated as a case where the purchaser must have known perfectly well that the offer was a mistake. *Van Praagh* v. *Everidge*[35] was reversed on appeal[36]; the obiter dictum of Henn Collins M.R. that "it is not clear to my mind "that the parties ever were ad idem; I do not think they were" is, it is submitted, quite wrong: see on this Williams on Vendor and Purchaser, 4th ed., vol. 2, p. 755 et seq.—that is sound sense and entirely consonant with *Tamplin* v. *James*.[37] [Reference was also made to *Scriven Brothers & Co.* v. *Hindley & Co.*[38]] As a matter of principle, the quickness with which the defendant avowed the mistake here cannot make any difference. In

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[31] [1932] A.C. 161.
[32] [1950] 1 K.B. 671.
[33] (1879) 15 Ch.D. 215, 220.
[34] 30 Beav. 62.
[35] [1902] 2 Ch. 266; 18 T.L.R. 593.
[36] [1903] 1 Ch. 434; 19 T.L.R. 220.
[37] 15 Ch.D. 215.
[38] [1913] 3 K.B. 564.

Torrance v. *Bolton*[39] there were misleading conditions of sale. That is the sort of highwater mark of the equity rescission cases. To rescind a contract one must find some appreciable contribution to the mistake by the other side.

On the whole of the facts the probabilities are against the defendant here being mistaken. Even if the Board is satisfied that the defendant was mistaken, it is not shown that there is any such contribution to her mistake by the plaintiff as would enable her to rescind the agreement. On the footing that it cannot be rescinded, the Board ought not to substitute for a decree of specific performance an inquiry as to damages. In a matter of discretion, where there has been, as here, a concurrent finding of both courts below, this Board will not interfere unless it is shown that the discretion has proceeded on some wrong principle: *Baldwin* v. *Baldwin*.[40] [Reference was also made to Snell's Principles of Equity, 24th ed., p. 536.] If the Board is not satisfied that the defendant was mistaken, there is no reason to interfere with the discretion and disturb the order of the Court of Appeal.

Alan Campbell in reply. First, on the point that there was no concluded contract; this point was raised and persisted in until judgment; there is nothing in the Record to show any admission that there was a contract. A plea for specific performance cannot succeed unless there is a contract. On his own contemporaneous documents and by his own pleading the plaintiff was accepting that there was no completed contract. Further, there had been no tender in cash in accordance with the express terms of the agreement, and that is a pre-requisite for a decree of specific performance.

Secondly, with regard to non est factum; that plea means that the mind did not go with the signature or that the parties were not ad idem: *Thoroughgood's* case[41]; *Smith* v. *Hughes*[42]; *Howatson* v. *Webb*.[43] Here the mind did not go with the signature, and the parties were not ad idem because there was no contract.

Thirdly, as to mistake—used in the sense that the parties were at cross-purposes; here the mistake was brought about by the other party on the very special facts which gave rise to a duty to explain: *Van Praagh* v. *Everidge*.[44] The concepts of non est factum and mistake do overlap. *Tamplin* v. *James*[45] is distinguishable—the facts were very different from those here; it was there said that there was nothing calculated to mislead. [Reference was also made to *Torrance* v. *Bolton*.[46]] In the face of *Solle* v. *Butcher*[47] it is not open to the plaintiff here to say that this doctrine should have the limited meaning which he ascribes to it. If he is right, then it is submitted that (a) there was ambiguity here, and (b) there was substantial contribution. There was ample scope for misunderstanding on any showing. The authorities referred to in Chitty on Contracts, 21st ed., p. 233, are mainly relevant to the question of mistake.

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[39] (1872) L.R. 8 Ch. 118.
[40] (1922) 128 L.T. 10.
[41] (1582) 2 Co.Rep. 5b.
[42] (1870) L.R. 6 Q.B. 597, 606.
[43] [1908] 1 Ch. 1, 3.
[44] [1903] 1 Ch. 434, 436.

Fourthly, on discretion; there has been no due exercise of discretion because there has been no adjudication on the relevant facts. On any showing it would not be right to grant specific performance; the matter is now entirely free for the Board to deal with.

Fifthly, and lastly, on the point that the action was premature; the submission for the defendant is supported by the authorities cited by Sir Frank Soskice. In English law the time for performance must be complete before one can institute a suit for specific performance, and the orders referred to in Seton's Forms of Judgments and Orders, 7th ed., vol. 3, p. 2136, carry the matter no further one way or the other. No authority has been produced to controvert the submissions for the defendant, which are sound in principle and supported by authority.

1960. January 19. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above, and continued: No authority for the defendant's proposition was cited, but it is true to say that there is no express decision in any English case to the contrary. Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which will justify the intervention by a court of equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions. The first of the forms in volume 3 of the seventh edition of

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[45] 15 Ch.D. 215.

[46] L.R. 8 Ch. 118, 124.

[47] [1950] 1 K.B. 671.

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Seton's Forms of Judgments and Orders, at p. 2136, is clearly suitable to a case where the time for performance may not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order in the event of an intervening circumstance frustrating the contract. Their Lordships cannot accept as conclusive the sentence relied upon by counsel for the defendant in the dissenting speech of Lord Sumner in *Leeds Industrial Co-operative Society Ltd.* v. *Slack*,[1] which was a case dealing with recovery of damages in lieu of an injunction, and which did not call for decision of the question now under discussion. On the other hand, the view expressed above accords with the decisions in the Canadian cases of *Roberto* v. *Bumb*[2] and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.*,[3] affirmed in the Court of Appeal[4] and by the Supreme Court of Canada,[5] and with the views expressed in the American Restatement of the Law of Contract, vol. 2, s. 360, as well as in Williston on Contracts, vol. 5, pp. 3708–3709. And in volume 2 of the fourth edition of Williams on Vendor and Purchaser the following passage occurs at p. 1001: "It has been mentioned that, "as a rule, either party to a contract to sell land is entitled to "sue in equity for specific performance of the agreement. This "right is, in general, founded on a breach of the contract, but "not in the same manner as the right to sue at law. The court "has no jurisdiction to award damages at law except in case of a "breach of the contract; while the equitable jurisdiction to order "an agreement to be specifically performed is not limited to the "cases in which at law damages could be recoverable." Support for this view is also to be found in the reasoning of Vaisey J. in *Marks* v. *Lilley*,[6] although the actual decision was concerned with a question of costs. Their Lordships accordingly agree with the decision of the Supreme Court of Kenya and the Court of Appeal for Eastern Africa in rejecting this contention, and holding that there is nothing in the Indian Contract Act to compel acceptance of the contrary view.

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[1] [1924] A.C. 851, 866; 40 T.L.R. 745.

[2] [1943] 2 D.L.R. 613.

[3] [1951] 3 D.L.R. 122.

[4] [1952] 1 D.L.R. 158.

[5] [1952] 2 S.C.R.(Can.) 465.

[6] [1959] 1 W.L.R. 749, 752; [1959] 2 All E.R. 647.

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The next submission on behalf of the defendant was that, in any event, there was no concluded contract between the parties, because the contractual document relied upon was never signed by the plaintiff or executed by him before the defendant repudiated it. This point was never pleaded, is inconsistent with the action of counsel for the defendant in accepting the burden of proof at the trial and making the opening speech, does not appear to have been argued in the courts below, is not dealt with in any of the judgments and does not appear in the appellant's Case or Reasons. In these circumstances their Lordships cannot entertain it, nor can they give effect to it as relevant to the exercise of discretion in ordering specific performance, since there may have been circumstances, which have never been investigated, from which it could be inferred that the signature of both parties to the document was not required.

Their Lordships will now turn to the defences relied upon at the trial, the success or failure of which depend upon the ascertainment of the facts.

The principal defence was the alleged fraudulent misrepresentation by the plaintiff to the effect that an option to purchase given by the defendant to the plaintiff on February 18, 1954, and the contract in writing dated February 19, 1954, related to a half-acre plot (which she had previously told the plaintiff she was willing to sell), whereas, in fact, these documents referred to a 2-acre plot, and that the said documents written in English, which language she did not understand, were never translated or read over to her in Gujerati. Her case was that at a meeting with the plaintiff in a bazaar in Nairobi early in February, 1954, at which her son Sadru Din was present, she had told the plaintiff that she wished to sell land comprising half an acre with a building on it, being one portion out of four subdivided plots next to the Mayfair Hotel, for Shs. 100,000. Sadru Din gave evidence to the like effect. It was proved in evidence that Sadru Din was not in Nairobi at the date in question, and the trial judge found he had given false evidence and the defendant had suborned him to commit perjury. These findings are not now disputed. The plaintiff's version of this conversation, which was accepted by the trial judge, was to the effect that the defendant had told him she had land over 2 acres with a building on it in Sclatters Road which she wished to sell, and for which she wanted Shs. 100,000. He asked for an option at this price for one week, but she was only willing to give him one for three days. They agreed to meet next day at about 9 a.m., when she would give him the option. The meeting took place and the defendant signed the option which appears at p. 377 of the record. It is headed:

"Re my House on Slater Road adjoining Mayfair Hotel, "Nairobi" and proceeds: "In consideration of Shs. 5/- five I "hereby give you option to purchase the above property for "Shs. 100,000 net one hundred thousand. The above property is "over 2 two acres and subdivision is completed, . . . The house "of above property will be given in vacant possession with all "vacant land contain

"This option is good up to 22nd February 1954 up to 1 p.m. "to your or to your nominis."

The defendant's evidence was that this document was never read over or translated to her. She signed and her signature was witnessed by her cousin, a girl aged about 17, called Amina Hasham. Amina gave evidence to the same effect.

The plaintiff's case was that the option was read over to her by him and also by Amina, who knew English. The next day, February 19, 1954, the agreement sued upon was signed at the office of a Mr. Ishani, an advocate of the Supreme Court, who had prepared the contract on the plaintiff's instructions. The defendant's case was that as a result of a telephone message from a Mr. Sultan she went to his shop, where she found the plaintiff, and from there all three of them went to Mr. Ishani's office. Ishani asked her whether the plot belonged to her alone and whether the option was binding on her, to both of which questions she answered "Yes." Thereupon Ishani wrote something on a piece of paper and sent it out to be typed. Two or three typed papers were brought back and Ishani told her to sign one, which she did. She said she wanted Shs. 25,000 down in cash, the plaintiff said he would pay Shs. 15,000 and then went up to Shs. 20,000, when Ishani intervened and said Shs. 81,000 was due to the Diamond Jubilee Trust on mortgage, to which she replied that she would make her own arrangements with the Diamond Jubilee Trust. At this point in the discussion Mr. Sultan remarked: "Oh, two acres are mentioned here," she said she was struck with horror and tore up the document she had signed. Her version was supported by Sultan, who was called as a witness for her. Ishani was also called by the defendant to say he never read or explained the document to her. He and Sultan also corroborated her evidence as to the conversation immediately prior to her tearing up the document.

The plaintiff's evidence was to the effect that before the defendant signed the agreement Ishani, who is the defendant's

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nephew, had read and explained the document to her. He said that the defendant objected to the cash payment of Shs. 10,000 mentioned in the contract before she signed it when Ishani reached that part of the agreement as he read it to her in Gujerati. Ultimately she agreed to Shs. 15,000 and a cheque for this amount was made out and handed to her. She then signed the agreement.

After signing she inquired whether he had resold the plot to Hashambhai. On being told that Hashambhai was the sub-purchaser she flew into a rage and tore up the document. On the same day Mr. Akram, an advocate, wrote on her instructions a letter setting out her version as outlined above of the circumstances in which she had torn up the document, and charging the plaintiff with fraud. Also on the same day a letter was written by Mr. Khanna, the plaintiff's advocate, which contained the following paragraph: "After signing the agreement it appears "you changed your mind, putting forward the excuse that you "were only selling the house and part of the land and not the "whole of the 2·04 acres, and tore up the stamped and signed "agreement and went away, declining to go through with the "completion of the transaction."

This letter is, of course, strong corroboration of the defendant's version of the reason she gave for acting as she did. The plaintiff, however, in his evidence persisted in his version, and in the course of his cross-examination gave evidence which was obviously false, and from which he ultimately resiled only in reply to a leading question in re-examination when he was recalled more than two months after his previous denials. It is now common ground that his earlier answers on this subject were deliberate falsehoods.

Out of this conflict of evidence, and with the plaintiff and defendant both having given what is now admitted to have been false evidence on parts of their cases, the trial judge had to be satisfied that the defendant, who had accepted the onus, had made out her case for rescission on the ground of the plaintiff's misrepresentation as to the contents of the documents which she had signed. The judge, having seen the witnesses in the box and having had the advantage, denied to an appellate tribunal, of forming an estimate as to their honesty and reliability, said in dealing with the events of February 19: "I regret to say that I "cannot trust any account of what then took place except the "account of the plaintiff." He did not give his reasons for rejecting the evidence of the defendant and her witnesses, but he had found that she had suborned one of her witnesses to commit perjury and must have felt that he could put little reliance on her other witnesses.

The Court of Appeal for Eastern Africa considered that the trial judge had not attached sufficient importance to the untruthful answers given by the plaintiff with regard to the reason given by the defendant for tearing up the agreement on February 19. They accordingly proceeded to re-examine the whole of the evidence in detail and to form their own assessment thereon, with the result that they arrived at the same conclusion as the trial judge.

Their Lordships have been invited to go through the same process with a view to reaching the conclusion that although fraud had not been proved, nonetheless the court should have given the defendant relief on the ground of mistake.

There are certain features in the case which have given their Lordships some anxiety. The most important of these are the following: (1) In a case of this nature a court will always give great weight to the contemporary documents, and the two letters, one from the defendant's advocate and the other from the plaintiff's, both show—as is now admitted—that the reason given by the defendant for tearing up the document was that which she had given in evidence. Whether or not it was the real reason or only her excuse, of course, remains to be decided. (2) The very unusual fact of a party tearing up a document almost immediately after having signed it. (3) The fact that the defendant would on the evidence admittedly have been out of pocket on the basis of the agreement of February 19, 1954. (4) That the document was written in a language which she could not read.

Their Lordships have, accordingly, reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to paragraph 11 of the defence. It reads as follows: " In the further " alternative the agreement sued upon was entered into by " mistake in that the terms thereof have been drawn up so as to " contravene the intention of the parties by purporting to refer " to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas as " it should have referred to the said portion of land only." This is a plea of mistake common to both parties which was not the case made by the defendant. Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part. In the present case the vital issue was whether the option and agreement were or were not read over and explained to the defendant. If she failed to satisfy the court on this issue there could be no ground for mistake on her part attributable to any conduct of the plaintiff. On the other hand, if she succeeded it is difficult to see how the plaintiff could have escaped a finding of fraud. It is for this reason that their Lordships consider that the trial judge was right in saying that the issue of mistake could carry no weight in view of the facts as he found them.

As stated above, their Lordships have carefully considered the whole of the evidence with the aid of the detailed examination and analysis thereof by counsel on each side and have arrived at the conclusion that the defendant has not made out a case for interfering with the findings of fact by the trial judge and the Court of Appeal, and that on these findings her claim for rescission on the ground of mistake cannot succeed.

It was also contended for the defendant that on the facts a defence of non est factum had been established. This plea, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document. This distinction is often a question of degree, but in the present case such defence is not open to the defendant since no false statement by anyone, other than that relied upon in support of the allegation of fraud, was alleged or proved, and the alleged misrepresentation by the plaintiff has been rejected. It accordingly is not necessary to decide whether the difference between the two acres and half an acre in the circumstances of this case would have been a difference as to the nature or contents of the document.

It should be stated that other defences were raised in the pleadings to which it is necessary to make passing reference. One was that the defendant never dealt with the plaintiff as a principal but merely employed him as her agent to find a purchaser. This issue was decided against her and is not now relied upon. A defence of undue influence was abandoned at the trial, and a further defence of rescission by mutual consent was not persisted in before the Court of Appeal.

It is necessary, however, to refer to the defence of undue influence which is contained in paragraph 10 of the defence, because the facts there set out were in substance relied upon before their Lordships in support of a submission by counsel for the defendant that the case was not one in which a court should in the exercise of its discretion order specific performance. The particulars to paragraph 10 of the defence are as follows: "The plaintiff in his "capacity as an agent for the defendant for the sale of the said "portion of land had gained active confidence of the defendant; "the defendant is an aged woman unable to read or write in the "English language, the land described in the option and agree"ment of sale is of a value greatly in excess of Shs. 100,000; the "said consideration is unconscionable and the nature of her acts "in signing the said option and agreement of sale was not "explained to or understood by the defendant."

In view of the abandonment of this plea and the findings of the trial judge and the Court of Appeal to the effect that the option and agreement were in fact read and translated to the defendant—a finding for disturbing which no sufficient grounds have been shown—their Lordships do not consider that a case has been made out for interfering with the discretion exercised by the trial judge, and approved by the Court of Appeal, in ordering specific performance of the contract of February 19, 1954.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Theodore Goddard & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

C. C.

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Jan. 25.

EDWARD LISO MUNGONI . . . . APPELLANT;

AND

ATTORNEY-GENERAL OF NORTHERN RHODESIA . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF RHODESIA AND NYASALAND.

Crown—Servant—Delegation of powers—Distinction between power and duty—Duty interwoven with power—Emergency regulations—Power to detain—Duty to be satisfied—Power of Governor to depute any powers—Meaning of "power"—Northern Rhodesia.

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

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MUNGONI *v.* ATTORNEY-GENERAL OF NORTHERN RHODESIA.

Emergency Legislation—Public safety or order—Delegation of powers—Detention order, duty of Governor to be satisfied of necessity for—Power of Governor to make—Power to delegate powers—Whether duty can be delegated—Emergency Powers Regulations, 1956, *of Northern Rhodesia, regs.* 16 (1), 47.

Northern Rhodesia.

By regulation 16 of the Emergency Powers Regulations, 1956, of Northern Rhodesia, made by the Acting Governor of Northern Rhodesia under powers conferred by the Emergency Powers Orders in Council of 1939 and 1956: " (1) Whenever the Governor is satisfied that for the purpose of maintaining public order it is "necessary to exercise control over any person, he may make an "order . . . directing that such person be detained . . . ", and regulation 47 provided that " The Governor may . . . depute any " person . . . to exercise all or any of the powers conferred on the " Governor by these Regulations . . ."

The Acting Governor of Northern Rhodesia having (with certain exceptions not here material) by instrument delegated " all " the powers " conferred on him by the regulations to the Provincial Commissioner, Western Province, the latter, stating that " I am satisfied that for the purpose of maintaining public order " it is necessary to exercise control over " the appellant, an African resident in Northern Rhodesia, in purported pursuance of regulations 16 (1) and 47 made an order for his detention. In an action for damages for wrongful arrest and detention the appellant contended, inter alia, that regulation 16 (1) put a *duty* on the Governor to be satisfied that it was necessary to exercise control before he exercised his *power* to make a detention order, and that his authority under regulation 47 to delegate applied only to *powers* and did not authorise him to delegate his *duty* to be satisfied, which he was bound to fulfil himself personally; the order for detention was, therefore, it was alleged, invalid:—

Held, that the power and the duty under regulation 16 (1) were so interwoven that it was not possible to split the one from the other so as to put the duty on one person and the power in another; the regulation contained not so much a duty, but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. In delegating his functions under regulation 16 (1) the Governor could delegate both the power and duty together to one and the same person—he could not delegate the power to another and keep the duty to himself. The requirement that he was to be satisfied was a condition or limitation on the exercise of the power, and when regulation 47 authorised him to delegate the power to any person, it authorised him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they were also duties. Accordingly, the detention order made by the Provincial Commissioner was valid.

Liversidge v. *Anderson* [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338 considered.

Judgment of the Federal Supreme Court of Rhodesia and Nyasaland [1958] R. & N. 710 affirmed.

Appeal (No. 14 of 1959), by special leave in forma pauperis, from a judgment of the Federal Supreme Court of Rhodesia and Nyasaland (September 10, 1958) allowing the appeal of the present respondent, the Attorney-General of Northern Rhodesia, from a judgment of the High Court of Northern Rhodesia (April 19, 1958) awarding the present appellant, Edward Liso Mungoni, £25 as damages for wrongful imprisonment.

This was the first appeal to the Board from the Federal Supreme Court of Rhodesia and Nyasaland.

The following facts are taken from the judgment of the Judicial Committee: The appellant was an African resident in Northern Rhodesia. He claimed damages for wrongful arrest and detention. The High Court of Northern Rhodesia (Mosdell Ag.J.) found in his favour and awarded him £25 damages. That decision was reversed by the Federal Supreme Court of Rhodesia and Nyasaland (Tredgold C.J., Lewey F.J., Paterson C.J.N.R.) who held that he had not been wrongfully arrested or detained. He now appealed to Her Majesty in Council asking not only that the judgment in his favour should be restored but also that the damages should be increased, because the sum of £25 was, he said, inadequate.

On September 11, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he said he was satisfied that a public emergency existed and he proclaimed that the provisions of the Orders in Council (those dealing with emergencies) should have effect in the Western Province of Northern Rhodesia. On the very same day he issued emergency regulations which gave the authorities wide powers, and in particular gave the Governor power to make detention orders. He also issued an instrument delegating many of his powers to the Provincial Commissioner of the Western Province.

At the time when the emergency was declared the appellant was living in the Twapia African Township, Ndola, which was in the Western Province of Northern Rhodesia. He was an official of the African National Congress. At 6 a.m. on September 16, 1956, police officers came to his house and arrested him. He was arrested for breaking the Emergency Regulations by attending a meeting which had been prohibited. He was not tried on that charge because at 7.30 p.m. that day the Provincial Commissioner for the Western Province made a detention order against him. It was in these words:

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"DETENTION ORDER

"Whereas it is provided by regulation 16 of the Emergency "Powers Regulations, 1956, that whenever the Governor is "satisfied that for the purpose of maintaining public order it is "necessary to exercise control over any person, he may make "an order against such person directing that such person be "detained.

"And Whereas it is further provided by the said regulation "that any person detained in pursuance of the said regulation shall be detained in such place as may be authorised by "the Governor;

"And Whereas the powers conferred upon the Governor by "the said regulation have been delegated under the provisions "of regulation 47 of the said Regulations to the officer for the "time being carrying out the duties of the Provincial Commissioner, Western Province;

"And Whereas I am satisfied that for the purpose of maintaining public order it is necessary to exercise control over one "Edward Liso Mungoni.

"Now, therefore, I, Glyn Smallwood Jones, Member of the "Most Excellent Order of the British Empire, Provincial Commissioner, Western Province, do hereby order that the said "Edward Liso Mungoni be detained and do hereby authorise "the Local Prison, Mumbwa, as the place where the said Edward "Liso Mungoni shall be detained.

"Given under my hand at Ndola this 16th day of September, "1956.

"(Signed) G. S. Jones,
"Provincial Commissioner."

In pursuance of the detention order, the appellant was taken to the detention camp at Mumbwa. Fifty-three others were taken as well. On November 2, 1956, Mr. Stewart, on behalf of the 54 detained persons, applied to the Chief Justice of Northern Rhodesia (Bell C.J.) for a writ of habeas corpus ad subjiciendum. On November 28, 1956, the Chief Justice held that the 54 orders of detention were invalid and ordered that the 54 detainees should be discharged forthwith (see *Stewart* v. *Chief Secretary of*

Northern Rhodesia[1]). They were so discharged, but the Governor of Northern Rhodesia himself immediately made restriction orders against them. The restriction order against the appellant was dated November 28, 1956, and prohibited him from being in the Western Province except under written permit. It was signed by the Governor himself. That order was subsequently continued by further orders, all signed by the Governor himself. Then, in 1959, one of the restricted persons named Mwenya applied to the High Court in London for leave to issue a writ of habeas corpus ad subjiciendum. The High Court (Lord Parker C.J., Slade and Winn JJ.) held that the courts of England had no jurisdiction to issue the writ (see *Ex parte Mwenya*[2]), but the Court of Appeal (Lord Evershed M.R., Romer and Sellers L.JJ.) on October 13, 1959, held that the courts had jurisdiction, though they did not determine whether it was proper to exercise it.[3] A week later, on October 20, 1959, the Governor of Northern Rhodesia revoked the restrictive orders. The appellant thereupon became free.

This appeal only concerned the period during which the appellant was detained under the detention order made by the Provincial Commissioner, that is to say, from 7.30 p.m. on September 16, 1956, to the time of his discharge on November 29, 1956. The appellant contended that his detention during that period was unlawful and claimed damages for false imprisonment. He had in his favour the ruling of Bell C.J. in the habeas corpus proceedings, holding that the detention order was invalid. But he, through his counsel, admitted that that ruling was not conclusive in his favour. The validity of the detention order could be investigated afresh in this civil action: see *Budd* v. *Anderson*.[4] And, indeed, it had been investigated afresh by each of the courts. Mosdell Ag.J., who tried the case at the first instance, thought that the decision of Bell C.J. was a proper one and held that the detention order was invalid. Accordingly, he awarded damages for wrongful detention. But the Federal Supreme Court thought the decision of Bell C.J. was wrong and likewise the decision of Mosdell Ag.J. was also. They held that the detention order was valid and reversed the award of damages.

The difference of opinion between the judges arose upon this: Bell C.J. (and Mosdell Ag.J. following him) held that, in order for the detention order to be valid, it was the duty of the *Governor* of Northern Rhodesia *himself* to be satisfied it was necessary to exercise control over the appellant. It was his personal duty to be satisfied. He could not delegate it. The Governor had not himself performed that duty and the detention order was therefore invalid. But the Federal Supreme Court held that it was not necessary for the Governor himself to be satisfied. He could delegate that task to the Provincial Commissioner of the Western Province. He had so delegated it and, inasmuch as the Provincial Commissioner was satisfied, that was enough, and the detention order was valid.

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[1] [1956] R. & N. 617.

[2] [1960] 1 Q.B. 241; [1959] 3 W.L.R. 509; [1959] 3 All E.R. 525.

[3] [1960] 1 Q.B. 241; [1959] 3 W.L.R. 767; [1959] 3 All E.R. 525.

[4] [1943] K.B. 642; [1943] 2 All E.R. 452.

1959. Dec. 3, 7. *E. L. Mallalieu Q.C., A. Ivan Kaufman* and *John Haines* for the appellant. Shortly after his release following the habeas corpus proceedings the appellant began the action out of which this appeal arose claiming damages for false imprisonment and was awarded £25. This is in the nature of a test case because 53 others were detained in similar circumstances. The point at issue is very short and is exactly the same as that which was raised and decided in the habeas corpus proceedings in favour of the appellant, namely, whether the detention order was properly made. The High Court (Mosdell Ag.J.) held that it was not, taking the view, correctly, it is submitted, that the judgment of Bell C.J. in the habeas corpus proceeding was right and for the reasons which he gave.

Acting under the Emergency Powers Orders in Council of 1939 and 1956 the Acting Governor of Northern Rhodesia on September 11, 1956, made the Emergency Powers Regulations, 1956, of Northern Rhodesia, regulations 16 and 47 being the material and important ones for present purposes. Regulation 16 (1) provided that: " Whenever the Governor is satisfied that for the purpose " of maintaining public order it is necessary to exercise control " over any person, he may make an order . . . directing that such " person be detained . . ."; and by regulation 47: " The Governor " may . . . depute any person . . . to exercise all or any of the " powers conferred on the Governor by these Regulations . . ." Regulation 16 (1) confers a *power* on the Governor—he may make an order; but the opening words of the regulation impose a *duty* on *him* to be " satisfied " that for the purpose of maintaining public order it is necessary to exercise control over any person. The contention is that the conferring of the power is quite distinct from the imposing of the duty; that the Governor gave himself

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power to make the order, and under regulation 47 he could delegate that power, but he retained for himself the duty of seeing that he was satisfied in each individual case—it is fundamental that the final decision in this matter should be left to the Governor. [Reference was made to *Ross-Clunis* v. *Papadopoullos*.[5]] This was a positive duty—not a mere tentative one—laid on the Governor to satisfy himself that the order was necessary; there must be a strict compliance with that requirement: *Musson* v. *Rodriguez*.[6]

Regulation 47 is entirely silent as to the delegation of duties; it is a power which can only be exercised in the strictest conformity with the provision which grants it: see *Liversidge* v. *Sir John Anderson*.[7] The duty to satisfy himself in cases of detention in no way defeats the efficacy of the regulations; regulation 16 (6) makes provision for a police inspector detaining a suspected person for a period not exceeding 28 days "pending "a decision whether a detention order should be made against "him." The object of that sub-regulation was to put the local authority in any given situation on their merits to initiate the machinery, whereas the Governor himself, far distant perhaps, might quite easily not have the necessary knowledge; it is left to the local authorities in each case to take the initiative.

There is no necessary connection between a duty and a power. Where it is intended that the Governor shall have power to delegate both powers and duties it is expressly so provided: see section 28 of the Interpretation Ordinance of the Territory, c. 1 of the Laws of Northern Rhodesia; the wording of that section follows that of regulation 47 to an amazing degree, with the one striking additional reference to duty. Section 28 does not apply, because regulation 47 expressly empowers the Governor to delegate powers and only powers. The omission from regulation 47 of any reference to duty does appear to have been intentional on the part of the Governor. In *Blackpool Corporation* v. *Locker*[8] this matter was not raised specifically; that case was not decided under the shadow of section 28, and that makes all the difference.

Admittedly the general policy of the regulations appears to be that when a regulation says, for example, "whenever it appears "to the Governor to be necessary," then if he wishes to delegate it he must do so in terms which carry the duty with the power.

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[5] [1958] 1 W.L.R. 546; [1958] 2 All E.R. 23.

[6] [1953] A.C. 530, 533; [1953] 3 W.L.R. 212, 214.

[7] [1942] A.C. 206, 251; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[8] [1948] 1 K.B. 349; [1948] 1 All E.R. 85.

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But in the regulations there is this right to be satisfied in most of the cases unless the matters are of a local nature and not of general application and not serious in their effect on the liberty of the subject. If it is considered that there is ambiguity as to the meaning of the regulations, then a construction most favourable to the appellant should be given where his freedom was jeopardised.

Kaufman following. The general damages of £25 were inordinately low—it is inexplicable that so small a sum should have been awarded for two-and-a-half months' detention; they should be substantial. [*Hook* v. *Cunard Steamship Co. Ltd.*[9] was referred to.] The appellant is also entitled to an award of special damages, the submission being simply that nobody knows what the Governor would have done during the period of detention, and therefore it must be assumed that the appellant would have been free to carry out his functions and earn his salary.

The Provincial Commissioner is only concerned with eliminating small local emergencies and not with major policy, and decisions affecting the liberty of the subject are of such wide importance that it is reasonable that the Governor should take every precaution to see that he is personally satisfied of the necessity for a detention order.

B. C. Roberts and *Mervyn Heald* for the respondent. The main argument for the appellant was that the function of being satisfied of the necessity of the order was a duty and not amenable to delegation under the statutory instrument which restricted the delegation to powers only. That proposition is based on the fundamental fallacy that the functions—powers and duties—are mutually exclusive terms. The proper question in relation to the words "whenever the Governor is satisfied" is not, was this a duty? but was this a power or part of a power? It was held in *Julius* v. *Lord Bishop of Oxford*[10] that "there may be circumstances which may couple a power with a duty to exercise it" —that is relied on for the proposition that the functions of power and duty are not mutually exclusive. There may be circumstances in which there is a sole power and circumstances in which that power is coupled with a duty to exercise it. It is a fallacious application of the proposition of law relating to functions to say that if certain words create a duty, then of necessity those words cannot form part of a power. If, here, the words do form part of the power, they are amenable to delegation under regulation 47, which permitted the Governor to delegate any of his powers in his discretion.

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[9] [1953] 1 W.L.R. 682; [1953] 1 All E.R. 1021.

[10] (1880) 5 App.Cas. 214, 222.

The requirement of being satisfied of the necessity of making the order is merely a limitation on the power to make the order. That limitation is similar to limitations inherent in all discretionary powers which have some limitation on their exercise. The only difference between this discretionary power and a discretionary power unfettered by express words is that here the fetter is expressed—whenever he is satisfied—and has not been left to the courts to imply. The condition imposed on the exercise of the power is that the detention must be necessary in order to preserve public order. The manner in which the legislature has ensured that that condition shall be preserved is by conferring on the Governor the power or right to determine whether or not the condition is satisfied. As was said by Tredgold C.J. in his judgment in the Federal Supreme Court[11]: " It does not make a " great deal of difference whether the necessity that the Governor " be satisfied is described as a duty or obligation upon the " Governor, or a condition precedent to the exercise of the powers " under the regulation. It was certainly not a duty or an obliga- " tion simpliciter." The existence of the words " whenever the " Governor is satisfied " fulfil the same type of function as that described by Lord Goddard C.J. to determine one's own jurisdiction in *Rex* v. *Ludlow, Ex parte Barnsley Corporation.*[12] See also Maxwell on Interpretation of Statutes, 10th ed., pp. 123, 367 and 370, in support of the general proposition that all discretionary powers impose obligations to some extent on the persons to whom the powers are given.

The real issue here is whether the function of being satisfied is an integral part of the power amenable to delegation under an express authority to delegate all or any of the powers conferred by the Emergency Powers. The argument for the appellant that when the Governor had delegated to the Provincial Commissioner the right to make an order he was himself left with a legal duty, of which he could not divest himself, to be satisfied of the necessity of the detention order is untenable. The proper interpretation of regulation 16 (1) is that it consists of two powers: (i) a right to determine the question whether or not detention of a particular person is necessary in the public interest; (ii) a right to make a detention order. Both those powers or rights are clearly amenable to delegation under regulation 47. The only duty created by regulation 16 (1) is an obligation not to exercise the second right to make a detention order until the holder has by the exercise of the first right resolved the question whether or not detention of the particular person is in the public interest—there is a duty not to proceed to the second power until he has exercised that power. This obligation is clearly a limitation on the exercise of the power to make a detention order; it is inextricably interwoven with the power.

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[11] [1958] R. & N. 710, 716.

[12] [1947] K.B. 634, 638–639; [1947] 1 All E.R. 880.

The Governor, when he made these regulations, intended that all the functions of regulation 16 (1) were of necessity to be exercised by the same person, and should be amenable to delegation under regulation 47 if the Governor so desired. Regard should be had to the very wide words of regulation 47, "may . . . depute " . . . all or any of the powers." On the apparent plain meaning of regulation 47 and in the context the Board should say that it meant what it said.

In the circumstances of this particular emergency it was inherently reasonable that the Governor should wish to confer on himself wide powers to delegate, so that events which occurred 200 or more miles away could be dealt with promptly. Regulations like these, subject to variations, have been adopted in Cyprus, Singapore, etc. *Carlish* v. *East Ham Corporation and Edwards* [13] may be of assistance; it is an authority for the proposition that the courts of England have not thought it improper, where a power consists of the right to do something conditionally on being satisfied that it is necessary or expedient to do so, that all these functions may be delegated under a general authority to delegate functions. In *Blackpool Corporation* v. *Locker*,[14] where the instrument of delegation apparently related exclusively to powers, the propriety of a delegation of all the functions was accepted.

Admittedly the powers in the present case are drastic, and there must be the strictest compliance with the provisions, but if the construction contended for on behalf of the respondent is correct, no question of there not being the strictest compliance with the provisions arises. With regard to the ambiguity point; *Liversidge* v. *Sir John Anderson* [15] is authority for the view that although in normal circumstances the right of the individual is paramount when questions of ambiguity occur, one exception to that general rule is that in times of emergency, when the whole safety and welfare of the State may be imperilled, the first right of the liberty of the subject must give second place to the overriding interest of the nation and State as a whole. That principle is applicable in the present circumstances.

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[13] [1948] 2 K.B. 380, 383; 64 T.L.R. 419; [1948] 2 All E.R. 550.

[14] [1948] 1 K.B. 349; [1948] 1 All E.R. 85, 101.

[15] [1942] A.C. 206, 218, 251, 280.

As to damages; the onus lies on the appellant in seeking special damages to prove that had it not been for the invalidity alleged he would not have suffered the loss complained of. That is a matter of evidence, and here there was abundant evidence which justified the trial judge in coming to the conclusion that the appellant had not discharged the onus.

Mallalieu Q.C. in reply. The short answer about special damages is that it is not known what the position would have been if this detention order had not been made: *Hook* v. *Cunard Steamship Co. Ltd.*[16] The two cases of *Carlish*[17] and *Blackpool Corporation*[18] were not decided under the shadow of section 28 of the Interpretation Ordinance. The words in the regulations are undoubtedly exceedingly wide, but they could have been wider still. As to the submission for the appellant that there could not be a delegation of a greater power than the Governor himself possessed, no doubt the Provincial Commissioner had with his power an implied duty to see that the occasion was proper for the exercise of the power, but it was always subject to exactly the same fetter as the Governor's power would have been had he chosen to exercise it himself—and that fetter is, of course, that he should be satisfied. If the fetter is not a serious personal obligation the floodgates might be open to delegation by the Governor. A decision in the appellant's favour would be an exercise of the court's discretion in a matter affecting liberty, and there would be no hindrance to the administration if the appellant's view were accepted. It was said by Lord Radcliffe, giving the judgment of the Board in *Attorney-General for Canada* v. *Hallet & Carey Ltd.*,[19] that: "It is fair to say that there is a well-known general "principle that statutes which encroach upon the rights of the "subject, whether as regards person or property, are subject to "a 'strict' construction. . . . the general principle means no "more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of "an interpretation that leaves private rights undisturbed." That passage was cited by Lord Morton of Henryton in giving the judgment of the Board in *Ross-Clunis* v. *Papadopoullos*,[20] and the position is precisely the same in the present case.

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[16] [1953] 1 W.L.R. 682.

[17] [1948] 2 K.B. 380.

[18] [1948] 1 All E.R. 85.

[19] [1952] A.C. 427, 450.

1960. January 25. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships draw particular attention to the fact that it was the Provincial Commissioner who made the detention order—it was he who said he was satisfied that it was necessary to exercise control over the appellant—and not the Governor himself.

The point at issue is to what extent, if any, the Governor of Northern Rhodesia can delegate his functions in respect of detention orders to the Provincial Commissioner. In order to enable him to delegate, it is necessary to find some express authority in that behalf. Their Lordships recall that in England the powers of the Secretary of State under regulation 18B were personal and could not be delegated. As Lord Wright said in *Liversidge* v. *Anderson*[1]: "The regulation places on the Secretary a public "duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on "his own responsibility to the utmost of his ability, weighing on "the one hand, the suspect's right to personal liberty, and, on the "other hand, the safety of the State in the dire national peril in "which during this war it has stood and stands."

But in Northern Rhodesia, the Emergency Regulations contain an express provision enabling the Governor to delegate his powers. And the question is how far that enables him to delegate his power to make detention orders. The authority to make detention orders is given by Emergency Regulation 16 (1) which is in these terms: "16. (1) Whenever the Governor is satisfied that "for the purpose of maintaining public order it is necessary to "exercise control over any person, he may make an order (hereinafter called a detention order) against such person directing that "such person be detained, and thereupon that person shall be "arrested and detained." Their Lordships would pause for a moment to notice that, under the regulation, the Governor cannot make a detention order unless he is first "satisfied" of what is there stated. In a sense that puts a *duty* on him to be "satisfied" before he makes an order. Can this duty be delegated by the Governor to someone else? Mr. Mallalieu argues that it cannot. The authority of the Governor to delegate applies, he said, only to *powers* and not to *duties*. He bases this on the words of Emergency Regulation 47, which defines the Governor's authority to delegate: " 47. The Governor may, by writing under " his hand, and either generally or specially, depute any person " or persons, either by name or by office, to exercise all or any of " the powers conferred upon the Governor by these Regulations, " subject to such conditions, if any, as he may specify, and thereupon any person so deputed shall have and exercise such powers " accordingly, but no such delegation shall affect or impair the " power of the Governor to act himself under these Regulations."

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[20] [1958] 1 W.L.R. 546, 558.

[1] [1942] A.C. 206, 265; 58 T.L.R. 35; [1941] 3 All E.R. 338.

Turning back now to regulation 16 (1), Mr. Mallalieu said that it contained a duty and also a power. The *duty* laid upon the Governor was to be " satisfied " that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. The effect of regulation 47, said Mr. Mallalieu, was to authorise the Governor to delegate his *power* to make an order, but it did not authorise him to delegate his *duty* to be satisfied. He was bound to fulfil this duty himself personally. This would not give rise to any practical difficulty, said Mr. Mallalieu, because regulation 16 (6) enables a police inspector to detain a suspect for 28 days pending a decision whether a detention order should be made against him.

Mr. Mallalieu said that this restriction of the Governor's authority to delegate (limiting it to powers and not extending it to duties) must have been deliberate. He said that regulation 47 was in striking contrast to section 28 of the Interpretation Ordinance (c. 1 of the Northern Rhodesian Ordinances, 1959 ed.) which empowers the Governor (in the cases to which it applies) to depute both powers and duties. It reads as follows: " 28. Where " by any law the Governor is empowered to exercise any *powers* " or perform any *duties*, he may, unless by law expressly prohibited from so doing, depute any person or persons by name, " or the person or persons for the time being holding the office or " offices designated by him, to exercise such powers or perform " such duties on his behalf, subject to such conditions, exceptions " and qualifications as the Governor may prescribe, and thereupon, or from the date specified by the Governor, the person " or persons so deputed shall have and exercise such powers and " perform such duties, subject as aforesaid: Provided that " nothing herein contained shall authorise the Governor to depute " any person to make rules under the power in that behalf conferred upon him by any law." Their Lordships appreciate the significance of this point so made by Mr. Mallalieu. It is clear that section 28 does not apply to the Emergency Regulations. Regulation 47 was inserted instead. And regulation 47—in contrast to section 28—only authorises the Governor to delegate powers, not duties. This was the determining factor which influenced Bell C.J. in the habeas corpus proceedings. He said [2]: " The wording of regulation 47 follows so closely the wording of " section 28 that, when the two stand side by side, the omission " from regulation 47 of the delegation of the performance of *duties* " imposed by law is very apparent."

Their Lordships can now turn to the instrument of delegation itself. It followed the words of regulation 47 very closely. It spoke of powers and not of duties. It was in these terms:

" Government Notice No. 221 of 1956.

" The Emergency Powers Orders in Council, 1939 and 1956.

" The Emergency Powers Regulations 1956.

" Delegation of Powers

" In exercise of the powers conferred by regulation 47 of the " Emergency Powers Regulations, 1956, all the *powers* conferred " upon the Governor by the provisions of the said Regulations, " other than the powers conferred by regulations 10, 16 (7), 16 " (9) and 20, are hereby delegated to the officer for the time being " carrying out the duties of the Provincial Commissioner, Western " Province.

" Given under by hand at Lusaka this eleventh day of Sep- " tember, 1956.

" A. T. WILLIAMS,
" Acting Governor."

Bell C.J. regarded that instrument as a valid delegation to the Provincial Commissioner of the *power* to make a detention order but no delegation at all of the *duty* of the Governor to be satisfied. That duty remained with the Governor himself and was, he thought, a " very proper limitation ": and, as the Governor had never fulfilled this duty in regard to the 54 detained persons, they must be released. In the key passage of his judgment he said[3]: "The delegation set out in Government Notice 221/56 is good as "far as it goes. The Provincial Commissioner can make a "detention order—but only when the Governor is satisfied that "it is necessary in terms of regulation 16 (1): and no delegation "of the duty of *satisfying* himself has been made by the "Governor. Without the step of 'satisfying' being taken, a "detention order is ultra vires. In the result, the 54 orders "of detention, the subject-matter of this application, are, in my "opinion, invalid, and I have no option but to order the release "of the detained persons, which I accordingly do."

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[2] [1956] R. & N. 617, 629.

While their Lordships share with the Chief Justice his concern for the liberty of the subject, they cannot agree with this line of reasoning. The power and the duty under regulation 16 (1) are so interwoven that it is not possible to split the one from the other—so as to put the duty on one person and the power in another. Whosoever exercises the power, he it must be who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under regulation 16 (1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself. Even this did not daunt Mr. Mallalieu. He said that if the power cannot be split from the duty, then it means that the Governor cannot delegate his functions under regulation 16 (1) at all: for he cannot delegate his duty under it to anyone.

It seems to their Lordships that the arguments for the appellant proceed on this fallacy: they assume that the duty under regulation 16 (1) is something separate and distinct from the power therein contained. Their Lordships cannot accept this view. In their opinion regulation 16 (1) contains not so much a duty, but rather a power coupled with a duty. The power of the Governor to make a detention order can only be exercised when he is "satisfied" that it is necessary. The requirement that he is to be satisfied—though in one sense a duty—is nevertheless also a condition or limitation on the exercise of the power. And when regulation 47 authorises the Governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. There are many powers in the Emergency Regulations to which the like applies. They

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[3] [1956] R. & N. 617, 629.

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start off " Whenever the Governor is satisfied " or " If it appears " to the Governor," or the like. Mr. Mallalieu was forced to say that, whenever such a condition or limitation was expressed, the Governor had to fulfil it himself and could not delegate it. Their Lordships cannot accept this view. A detailed study of the regulations convinces them that it was intended that in all these cases the Governor should be able to delegate the power together with the fulfilment of the condition precedent to its exercise.

The reason why regulation 47 refers only to " powers " and not to " duties " became apparent in the course of the argument. The Emergency Regulations impose no duties on the Governor simpliciter—nothing, for instance, which a mandamus would issue to command him to perform. The only duties on him are those which are appurtenant to powers conferred on him and are in the nature of conditions or limitations on the exercise of the powers. All these can be delegated under regulation 47, and there was no reason to apply section 28 of the Interpretation Ordinance.

For these reasons, which are substantially the same as those given by Tredgold C.J. in the Federal Supreme Court, their Lordships are of opinion that the detention order was valid. No question arises therefore about damages.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant being in forma pauperis, there will be no order as to costs.

Solicitors: *Parke, Tattersall & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

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Nov. 2, 3, 30.

UNIT CONSTRUCTION CO. LTD. . APPELLANT;

AND

BULLOCK (INSPECTOR OF TAXES) . . RESPONDENT.

Residence—Company—Income tax—Unauthorised management outside country of registration—Finance Act, 1953 (1 & 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

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* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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Company—Residence—Income tax.

By section 20 (9) of the Finance Act, 1953: "For the purposes "of this section, 'company' includes any body corporate, but reference to a company shall be taken to apply only to a company "resident in the United Kingdom and carrying on a trade wholly "or partly in the United Kingdom."

Three companies which were wholly-owned subsidiaries of A. B. & Co. Ltd., a company resident in the United Kingdom, were registered in Kenya. The boards of the three subsidiaries, situate in Kenya, were entirely distinct from the board of the parent company, but none of those boards ever either took any decisions as a board or were summoned to meet as a board, and the real control and management was exercised by the board of A. B. & Co. Ltd. That arrangement was not authorised by the memoranda or articles of the subsidiaries. The appellant company, also a wholly owned subsidiary of A. B. & Co. Ltd., made certain payments to the Kenya subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the Kenya subsidiaries were "resident in the United Kingdom" within the meaning of section 20 (9), then the payments in question were subvention payments which the appellant company was entitled to deduct:—

Held, that it was the actual place of management of a company and not the place where it ought to be managed which fixed the residence of a company, and by that test this company was "resident in the United Kingdom" (post, pp. 363, 370, 374).

Union Corporation Ltd. v. *Inland Revenue Commissioners* [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 (C.A.); [1953] A.C. 482; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729 (H.L.); *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* [1929] A.C. 1; 44 T.L.R. 747 (H.L.) and *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15; (H.C. of A.) (1941) 64 C.L.R. 241 considered.

Dicta of Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455, 458; 22 T.L.R. 756 (H.L.) and of Lord Halsbury in *American Thread Co.* v. *Joyce* (1913) 6 T.C. 163, 165; 29 T.L.R. 266 (H.L.) explained.

Decision of the Court of Appeal [1959] Ch. 315; [1959] 2 W.L.R. 437; [1959] 1 All E.R. 591 reversed.

APPEAL from the Court of Appeal (Jenkins, Romer and Pearce L.JJ).

This was an appeal from an order of the Court of Appeal dated February 12, 1959, dismissing an appeal by the appellant company, Unit Construction Co. Ltd., from an order of the Chancery Division (Wynn-Parry J.) dated July 22, 1958, whereby an appeal by the respondent, Vernon William Bullock (Inspector of Taxes).

on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who sustained the claim of the appellant company, was allowed and their decision was reversed.

The appellant company was a wholly-owned subsidiary of an English company, Alfred Booth & Co. Ltd. So were three companies, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. In paragraph 5 (2) of the case stated it was said: " Each of the African subsidiaries is incorporated in Kenya under " the Kenya Companies Ordinance and has its registered office in " Nairobi. The articles of association of each of them contains " provisions placing the management and control of its business " in the hands of its directors and providing that directors' meet- " ings may be held anywhere outside the United Kingdom."

In article 28 of the articles of association of Booth & Co. (Africa) Ltd. it was provided that: " Directors' meetings may " be held anywhere outside the United Kingdom and clause 81 " of Table A shall be construed accordingly." A similar provision was to be found in the articles of association of the other African subsidiaries.

It was admitted on behalf of the appellant company that the African subsidiaries are resident in East Africa.

Between 1948 and 1950 the African subsidiaries had been operating so unsuccessfully that, according to paragraph 5 (2) of the case stated, in 1950 it was considered that " the condition of " the African subsidiaries was becoming so serious that it was " unwise to allow them to be managed in Africa any longer, and " that their management must be taken over by the directors of " Alfred Booth & Co. Ltd. in London." In paragraph 10 of the case stated it was said: " We find that the position was at the " material times that the boards of directors of the African sub- " sidiaries (who are the people one would have expected to find " exercising control and management) were standing aside in " all matters of real importance and in many matters of minor " importance affecting the central management and control, and " we find that the real control and management was being exer- " cised by the board of directors of Alfred Booth & Co. Ltd. in " London."

The appellant company made certain payments in 1952 and 1953 to the three African subsidiaries and claimed to be entitled to deduct them for the purpose of its assessment to income tax under Case I of Schedule D for the relevant years. It was common ground that it was entitled to do so only if those companies were then "resident in the United Kingdom and carrying on a "trade wholly or partly in the United Kingdom."

F. Heyworth Talbot Q.C. and *John Creese* for the appellant company. This matter turns on the true construction of section 20 (9) of the Finance Act, 1953. In summary the case for the appellant company is that a company is resident where the central management and control of its business actually abides, and that in the case of the African subsidiaries this was wholly or substantially in the United Kingdom, so that they were resident there. The finding in paragraph 10 of the case stated is conclusive in the appellant company's favour.

In *De Beers Consolidated Mines Ltd.* v. *Howe* [1] Lord Loreburn L.C. defined the residence of a company. In a general view of the cases the application of the test which he laid down gives rise to no special difficulty. He stated the question as "a pure "question of fact" and one must look at what was in fact done. Otherwise one would have to inquire whether what was done was regularly done in accordance with the articles of association. If the test was to be understood as referring only to a company's central management and control according to its constitution, it could not be applied in this case. But the test must be applicable to the case of a company where the board never meets as a board or takes a decision as a board and where it stands aside and lets a sole shareholder do everything involved in central management (for example, where a parent company is the sole shareholder), not merely to a case where the subsidiary is obedient to the wishes of the parent company, but one where its board does not in any way exercise its functions.

It is accepted that in the cases cited for the appellant company in the court below the possibility of the present situation was not contemplated, and one should not attach too much importance to the language used in them. But, then, in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[2] relied on by the respondent and by the Court of Appeal in this case, the Master of the Rolls was not contemplating such a case as the present when he spoke of "power" and "authority." So, in this respect, the same criticisms are equally valid against both the appellants and the respondent.

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[1] [1906] A.C. 455, 458 (H.L.); 22 T.L.R. 756.

[2] [1952] 1 T.L.R. 651 (C.A.); [1952] 1 All E.R. 646; [1953] A.C. 482 (H.L.); [1953] 2 W.L.R. 615; [1953] 2 All E.R. 729.

The question of the residence of a company in such circumstances as the present is one of very wide import. The peculiar feature in the present case is that the boards of the African subsidiaries did not function at all at the material times even as a rubber stamp. That must be reckoned with in the decision of this case. The case may be different where the board of a subsidiary company is complaisant to do the will of the parent company but actually functions in giving effect to the parent's wishes.

If the Crown's contentions were right, it would be easy for an English company to give effect to a desire to carry on business in Africa, to have the fullest control of that business and, at the same time, to be immune from United Kingdom income tax on its African profits. All that would be necessary would be to appoint two or three people to the board of an African subsidiary and tell them that they need never meet; a mere formal appointment of directors would be enough to make the company resident there. The arrangement could be changed at will from year to year. That would be a very odd result. Such a company would not be a sham, because it would be brought into being according to the forms of law.

If one loses the anchor of Lord Loreburn's test, there is no knowing where one may drift. Much has come to depend on it, including statute law: see section 468 (7) of the Income Tax Act, 1952. In the *De Beers* case [3] there was an insistence on looking at the realities of the situation to see where the head and brains of the company were.

Much reliance was placed by the respondents on *Gramophone and Typewriter Ltd.* v. *Stanley*,[4] but it is distinguishable: see *per* Fletcher Moulton and Buckley L.JJ.[5] There it was held that the parent company could not in fact be carrying on the business of the subsidiary company, as the powers of the shareholders as such did not invest them with the control and management of the business of the company. That case has no bearing here where the business in question is really that of the African subsidiaries and they are the companies which one has to locate by finding where their management and control were located. In *Swedish Central Railway Co. Ltd.* v. *Thompson* [6] it was held

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[3] [1905] 2 K.B. 612, 638; 21 T.L.R. 578 (C.A.); [1906] A.C. 455 (H.L.).

[4] [1908] 2 K.B. 89 (C.A.); 24 T.L.R. 480.

[5] [1908] 2 K.B. 89, 100–101, 103, 105–106.

[6] [1924] 2 K.B. 255, 277 (C.A.); [1925] A.C. 495, 499, 501 (H.L.); 41 T.L.R. 385.

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that a company can be simultaneously resident in more than one place, but it was not doubted that it is resident where the central control and management are actually found. In *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* [7] nothing was done in the United Kingdom but compliance with the bare minimum requirements of English company law. Viscount Sumner referred to the place where the company's business was directed, but the possibility of that direction being de facto in persons who were not de jure directors was not considered. In *Union Corporation Ltd.* v. *Inland Revenue Commissioners* [8] there was no evidence that the central management and control of the businesses of any of the companies concerned was exercised otherwise than in accordance with the constitution of that company. What was said in that case in the Court of Appeal [9] in the passage relied on by the respondents was not directed to such a case as the present.

The test laid down by Lord Loreburn emerges from the authorities supreme and authoritative. It may no longer be exclusive and there may be an alternative criterion, but it is unchallengeable that where one finds management and control of the company's business, there the company must be held to be resident. The fact that the persons who actually manage the company's affairs have no power in law to do so is not material. If a company carried on activities outside the objects of its memorandum, that would make no difference to its liability to tax on the profits so made.

The commissioners were right in law in holding that they need go no further than finding as a fact that the controlling power over the African subsidiaries was actually exercised by the parent company in London. It was unnecessary to consider whether that authority was exercised under the constitution of the subsidiary concerned by the officers to whom the constitution gave it. The acts which determine a company's residence need not be regular and constitutionally lawful.

Section 468 (7) of the Income Tax Act, 1952, points in the same direction, making the test of residence of a company the place where the central management and control is exercised, not where it is located by the company's constitution.

See also *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.*

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[7] [1929] A.C. 1, 10–12, 16, 20, 25 (H.L.); 44 T.L.R. 474.

[8] [1953] A.C. 482.

[9] [1952] 1 T.L.R. 651, 659, 663.

(*Great Britain*) *Ltd.*[10] and *In re Hilckes*,[11] trading with the enemy cases. If the *De Beers* case[12] applies in such cases, it should apply here.

In the case of an ordinary company it is not necessary to look beyond the directors and where they meet. But, where they do not and cannot exercise their powers, one must look to the facts beyond what was formally done.

As to the line between de facto management and de jure management, only a piece of paper was needed to transform the former into the latter. See the Kenya Companies Ordinance, 1933 (No. XXVIII), Table A, clause 85, as to the directors' power of delegation, which could easily have been invoked.

Roy Borneman Q.C. and *Alan Orr* for the respondent. On the facts, the subsidiaries were not, during the relevant period, resident in the United Kingdom for the purposes of section 20 (9) of the Act of 1953. There was no evidence to justify the decision that they were so resident. In so finding, the commissioners acted on a view of the facts which cannot be reasonably entertained. Having found that the controlling power over the subsidiaries was exercised by the parent company in London, they were wrong in law in holding that it was unnecessary to ask whether the exercise was under the constitution of the particular subsidiary by the officers to whom the constitution entrusted it. Since by the constitutions of the subsidiaries, their memorandum and articles interpreted in the light of the law of Kenya, the relevant law here, the companies should have been managed outside the United Kingdom, the control and management are to be regarded as abiding outside the United Kingdom. When judges in the cases cited said that control and management are the test of residence for a company, they were not thinking of a case like the present where there is a conflict between the company's regulations and what has in fact been done. Such observations have no bearing on the present case. The respondent's submissions are well stated in the judgment of the Court of Appeal.[13]

It has been admitted that the companies are resident in East Africa. To succeed, the appellants must show a split in the supreme or directing authority. One must look only at the constitutional acts of the subsidiaries. They took great pains to show that they were not resident in the United Kingdom. They were incorporated in Kenya and their articles provided that the directors' meetings could be held anywhere outside the United Kingdom: see, for instance, article 28 of the articles of Booth & Co. (Africa) Ltd. In the present case, in contrast to the facts of the cases relied on for the appellants, the articles were so framed that it should have been impossible for control and management to be exercised in London. See also article 9 (providing that general meetings shall be held in Kenya) and articles 22 and 27 (as to directors being removed from office or otherwise vacating their office). See also clause 67 of Table A in the Kenya Companies Ordinance, 1933. Nothing was done to amend this clause so as to put the power in the African subsidiaries into the hands of persons other than the directors. See also paragraph 145 (1) (*b*) of the Ordinance.

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[10] [1916] 2 A.C. 307, 318–319, 337–338 (H.L.); 32 T.L.R. 624.

[11] [1917] 1 K.B. 48, 53, 54 (C.A.); 33 T.L.R. 28.

[12] [1906] A.C. 445.

[13] [1959] Ch. 315, 332, 333, 336–337, 337–338, 340; [1959] 2 W.L.R. 437; [1959] 1 All E.R. 591.

If the Crown's contentions are not right, all certainty in these matters would be at an end. If the acts of a parent company in controlling a subsidiary can affect its residence, the same principle would apply in the case of the acts of a controlling shareholder. It is the acts of the directors of a company as such that count in determining residence; where they do it cannot affect the validity of their acts. Section 468 of the Income Tax Act, 1952, deals with change of residence.

What Lord Loreburn said in the *De Beers* case [14] and what other judges said in the authorities relied on by the appellant company as to the acts which determine a company's residence must have envisaged acts which are regular and constitutionally lawful. Nor could Lord Loreburn have had in mind a case of split control like the present case. Yet his test has worked well for 60 years. Extraneous interference is not to be taken into account: see *Gramophone and Typewriter Ltd.* v. *Stanley*,[15] where the whole issue was as to the regard to be paid to the fact that ultimately an English company could determine what could be done by a German company abroad. Lord Loreburn's test has brought order into these cases on the basis that extraneous interference does not determine where control resides. Control cannot abide anywhere save where the controlling authority is vested according to law; otherwise certainty goes for ever: see what was said in the Court of Appeal in the *Union Corporation* case,[16] which shows that the essential feature must be the directing authority within the constitution of the company.

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[14] [1906] A.C. 455.

[15] [1908] 2 K.B. 89

[16] [1952] 1 T.L.R. 651, 663–664.

Here the African subsidiaries were not registered in the United Kingdom. Article 28 of the articles of Booth & Co. (Africa) Ltd., which is reproduced in the articles of the other African subsidiaries, is important. The management and control, vested in the directors, cannot be exercised in London. Unless one finds part of the superior and directing authority of a company exercised in a particular country, its residence cannot be there. This company cannot show that part of its superior and directing authority was exercised in the United Kingdom, because the extraneous pressure of persons other than the duly appointed officers of the company cannot be taken into account.

Decisions of the courts for the last 50 years have been given on the assumption that the respondent's contentions are right. If the appellants' contentions are right the whole thing is thrown into the melting-pot again.

Alan Orr following. In the cases on which the appellant company relied the judges did not have such a case as the present in mind. Whatever they said, they must be taken to have envisaged acts constitutionally lawful: see what was said in the Court of Appeal in the present case.[17] When one becomes involved with the investigation of things which go on outside the company itself, there is no end to such an investigation.

F. Heyworth Talbot Q.C. in reply. There are no good grounds for limiting the matter as the Court of Appeal did. One must look at the realities in a case like this. The realities here have been found by the Special Commissioners.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, the appellant company is a wholly-owned subsidiary of an English company, Alfred Booth & Co. Ltd. So are three companies, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd., all of which are companies registered in Kenya under the laws of that colony. To these three companies, to which I will sometimes refer as "the African subsidiaries," the appellant company made certain payments in the years 1952 and 1953 and claims to be entitled under section 20 of the Finance Act, 1953, to deduct them for the purpose of its assessment to income tax under Case I of Schedule D for the relevant years. It is common ground that it is entitled to do so if, and only if, such companies were then "resident in

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[17] [1959] Ch. 315, 337.

"the United Kingdom and carrying on a trade wholly or partly "in the United Kingdom."

My Lords, the claim of the appellant company was sustained by the Commissioners for the Special Purposes of the Income Tax Acts, but upon a case stated by them was rejected by Wynn-Parry J., whose decision was affirmed by the Court of Appeal.

It will, I think, appear that the point for your Lordships' consideration in the present case is a short one, though any mention of so vexed a question as the residence of a company is likely to give rise to prolonged discussion. Here there are findings of fact which learned counsel for the Crown was constrained to admit that he could not challenge, and the only question is whether the conclusion in law which the special commissioners drew from those facts was correct.

I should like at the outset to say that this case was stated with conspicuous clarity for the opinion of the court, and that the detailed and careful review of the facts by the special commissioners led them irresistibly to the conclusion which they thus state: "We find that . . . the boards of directors of the African "subsidiaries (who are the people one would have expected to "find exercising control and management) were standing aside in "all matters of real importance and in many matters of minor "importance affecting the central management and control, and "we find that the real control and management was being exer-"cised by the board of directors of Alfred Booth & Co. Ltd. in "London." This being their conclusion of fact, it is not surprising that as a matter of law they concluded that these companies were resident in London. For it has been trite law for two generations or more that a limited company "resides for purposes of income "tax where its real business is carried on," and that its "real "business is carried on where the central management and "control actually abides." This test has not only been reasserted and applied over and over again in judicial decisions; it has now also received legislative recognition, see section 468 (7) of the Income Tax Act, 1952. It cannot be questioned by your Lordships. The familiar words that I have cited come from Lord Loreburn's speech in *De Beers Consolidated Mines Ltd.* v. *Howe*.[1] At that time the possibility of an artificial person such as a limited company residing in two countries at one and the same time had not been fully examined. Twenty years later, in

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[1] [1906] A.C. 455, 458 (H.L.); 22 T.L.R. 756.

Swedish Central Railway Co. Ltd. v. *Thompson*,[2] Rowlatt J. saw no difficulty in such a concept and, indeed, found it easier for a corporation to have two residences than for a natural person and, though in the same case in the Court of Appeal Atkin L.J. (as he then was) said that he felt constrained by authority to come to a different conclusion, and in the House of Lords Lord Atkinson in a powerful dissenting speech took the same view, it must now be regarded as clear law that an artificial person may, like a natural person, have more than one residence. The relevance of this consideration is that at an early stage in the proceedings (before the special commissioners, I think) it was admitted on behalf of the appellant company that the African subsidiaries were resident in Africa. I do not know what considerations led to this admission being made, but it appears to me to have no weight, if it is conceded as a matter of law that a company may have two residences. It is not necessary for me (and I count it my good fortune) on this occasion at any rate to determine in what sense a company may be said to reside not only in that country in which, and in which alone, the central management of its business is exercised, but in another country also. I share to the full the difficulty entertained and expressed by Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation*,[3] to which reference was made in the judgment of the Court of Appeal. I leave to others the reconciliation of the *Swedish Central Railway Co.* case,[4] to which I have referred, and *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd.*[5]

What then, my Lords, were the reasons which led the courts below to hold in face of this finding of fact and this state of the law that the African subsidiaries were not resident in the United Kingdom? Undoubtedly they raise a difficult and interesting question of law, which if decided in the manner now contended for by the Crown must have far-reaching and probably deplorable consequences for the Revenue. For the contention of learned counsel for the Crown which has so far found favour with the courts is no less than this, that if by the constitution of the company, that is by its memorandum and articles of association, interpreted in the light of the relevant law, that is, in this case the law of Kenya, the management of the company's business is contemplated as being exercised and ought therefore to be exercised in Kenya or at any rate outside the United Kingdom, then for the purpose of British income tax law the facts are to be disregarded, and the control and management which as a fact are found to abide in the United Kingdom are to be regarded as abiding outside it. There is no doubt, I think, that the management of the African subsidiaries, which were incorporated in Kenya under the Kenya Companies Ordinance and registered in Nairobi, was placed in the hands of its directors and that their articles of association expressly provided that directors' meetings might be held anywhere outside the United Kingdom. Nor can there be any doubt—for this is the unchallengeable finding of the commissioners—that the management of the businesses of the companies was not exercised in the manner contemplated. Whence it follows that the businesses were conducted in a manner irregular, unauthorised, and perhaps unlawful. It is this fact which led the learned judge to say in words that were approved by the Court of Appeal [6]: "It must follow to my mind that . . . "no weight or attention can be given to the activities of the "board of the parent company in relation to Unit [the appellant "company] and the African subsidiaries for the purpose of "considering whether or not any of them are resident in the "United Kingdom." So also the Court of Appeal, observing upon the test of residence laid down in the authorities, said [7] that "there is no reason at all to suppose that the judges had in "mind such a case as the present in which de jure management "is vested in one company whilst de facto control is vested in "another," and again they insisted that it was "acts or elements ". . . regular and not irregular, constitutionally lawful and not "unlawful" that must be regarded in determining the question of management and therefore of residence.

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[2] (1923) 9 T.C. 343, 352; (C.A.) [1924] 2 K.B. 255; (H.L.) [1925] A.C. 495; 41 T.L.R. 385.

[3] (1940) 64 C.L.R. 15; (H.C. of A.) (1941) 64 C.L.R. 241.

[4] [1925] A.C. 495.

[5] [1929] A.C. 1 (H.L.); 44 T.L.R. 747.

My Lords, I should certainly be prepared to admit that the many judges who in the past have pronounced upon this question had not in mind such a case as this. But, with great respect to those who take a different view, the present case does not seem to lie outside the principle underlying their judgment. Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful.

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[6] [1959] Ch. 147, 165; [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186.

[7] [1959] Ch. 315, 337; [1959] 2 W.L.R. 437; [1959] 1 All E.R. 591.

The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. If, indeed, I must disregard the facts as they are, because they are irregular, I find a company without any central management at all. For, though I may disregard existing facts, I cannot invent facts which do not exist and say that the company's business is managed in Kenya. Yet it is the place of central management, which, however much or little weight ought to be given to other factors, essentially determines its residence. I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?

In my opinion, Wynn-Parry J. and the Court of Appeal have adopted a wrong test in this admittedly difficult case. I would allow this appeal and restore the determination of the commissioners. The respondent must pay the appellants' costs here and below.

My Lords, since writing this opinion, I have been privileged to read the opinion which my noble and learned friend, Lord Radcliffe, will deliver, and I wish to add that I concur in his observations, and in particular in the manner in which he would reconcile the two decisions of this House to which I have referred, and in his view of the weight that should be given to the admission made by the appellants concerning the residence of the subsidiary companies in Kenya.

LORD RADCLIFFE. My Lords, it seems that the opinion of this House on the important question raised by the appeal differs from the unanimous judgment of the Court of Appeal and the judgment of Wynn-Parry J. in the High Court. I think, therefore, that I ought to say in my own words why it is that I regard these judgments as incorrect. It is best to begin by making it plain what are the essential facts of the case and what is the exact question which requires decision.

The general facts are found for us by the special commissioners and are set out in detail in the case stated. In my view, they admit of only one conclusion, that by the year 1952 every decision of any importance that concerned the running of the businesses in Kenya of the Alfred Booth & Co. Ltd. subsidiaries was being taken in London by directors of the parent company. To manage the subsidiaries in this way was inconsistent with the provisions for their management laid down by their respective articles of association, under which the boards of directors held the managerial power and their meetings could not validly be held in the United Kingdom. On the other hand, this departure of practice from form was not due to any initial intention to conceal the former by the latter. It came about because between 1948 and 1950 the subsidiaries had been operating so unsuccessfully that the parent company decided, to use the words of the case stated (see paragraph 5 (2)), "the situation "of the African subsidiaries was becoming so serious that it was "unwise to allow them to be managed in Africa any longer, "and . . . their management must be taken over by the directors "of Alfred Booth & Co. Ltd. in London."

On those facts the seat of the "central management and "control" of the subsidiaries changed, and passed from Africa to the United Kingdom. This is a straightforward case of de facto control being actively exercised in the United Kingdom, while the local directors "stood aside" from their directorial duties and never purported to function as a board of management.

Upon those facts the question has arisen whether the subsidiaries are entitled to be regarded as resident in the United Kingdom during the years 1952 and 1953, with the consequence that each of them would fall within the description of "a com-"pany resident in the United Kingdom and carrying on a trade "wholly or partly in the United Kingdom" for the purposes of section 20 of the Finance Act, 1953. If they do, then the appellant company, which is also an Alfred Booth & Co. Ltd. subsidiary, can treat certain payments which it made to them in those years as "subvention payments" under the section and, accordingly, can deduct them from its assessments under Case I of Schedule D for the years 1953–54 and 1954–55.

The appellant has throughout the case admitted that the three African subsidiaries were at all material times resident in East

Africa. This is spoken of as an admission, though it seems to me that it might just as well be described as a claim. The grounds upon which this "admission" was founded are not before us. I do not know whether they were supposed to be the fact of incorporation in Kenya, or the adoption of articles of association under the Kenya Companies Ordinance of 1933, or the residence in Kenya of the ostensible directors, or the practical side of business being done in Kenya, or a combination of some or all of these facts. Since it has been common ground between the parties that a company may have more than one residence for the purposes of taxation, I do not think that the admission has any particular bearing on the point that we have to decide; nor has it been so treated in any court. For my part, however, I wish that the admission had not been made. I do not know precisely what it is intended to concede; and I have found that decisions of courts are sometimes the less satisfactory on questions of principle because the issue has been prejudiced by the making of an admission which turns out to embody a legal conclusion as well as matters of fact.

The ascertainment of a limited company's residence for tax purposes involves several very familiar propositions. No statute hitherto has laid down any definition of this residence or prescribed any rules for determining it, except so far as subsection (7) of section 468 of the Income Tax Act, 1952, not only governs that section but also forms a statutory acceptance of an existing rule. I think that a statutory code could have been provided and on the whole I regret that it has not. On the other hand, the necessity of establishing some common standard for the treatment of different taxpayers meant that the courts of law were bound in course of time to produce and apply some general principle of their own to form an acceptable test of residence. No doubt it might have taken a variety of forms—the country of incorporation, the site of general meetings, the site of meetings of the directors' board were all possible candidates for selection as the criterion. In fact, as we know, the principle was adopted that a company is resident where its central control and management abide: words which, according to the decision of the House of Lords that finally propounded the test (*De Beers Consolidated Mines Ltd.* v. *Howe* [8]) are equivalent to saying that a company's residence is where its "real business" is carried on.

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[8] [1906] A.C. 455.

It is true that the law so declared substitutes a judicial formula for the general words of the statute, a form of limitation which one normally seeks to avoid. But, in the circumstances, I believe such a process to have been inevitable, and, in my opinion, the *De Beers* judgment,[8] followed as it is by a number of other judgments of the highest authority which have accepted the same principle, must be treated today as if the test which it laid down was as precise and as unequivocal as a positive statutory injunction. That means that there is no escape from Lord Loreburn's words[9]: " . . . a company resides for purposes of income tax where " its real business is carried on . . . I regard that as the true rule, " and the real business is carried on where the central manage" ment and control actually abides."

I do not know of any other test which has either been substituted for that of central management and control, or has been defined with sufficient precision to be regarded as an acceptable alternative to it. To me, at any rate, it seems impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting the test of residence. If the conditions he postulated were present, there was residence: if they were not, other conditions did not suffice to make up residence. And so, I think, his meaning was universally understood, not least in judgments of this House (see *American Thread Co.* v. *Joyce*[10]; *New Zealand Shipping Co. Ltd.* v. *Thew*[11]; *Bradbury* v. *English Sewing Cotton Co. Ltd.*[12]), for the next twenty years.

So far as I am able to perceive, only two qualifications have since appeared which mar at all the simplicity and generality of his test. One is that the facts of individual cases have not always so arranged themselves as to make it possible to identify any one country as the seat of central management and control at all. Though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic. Situations of this kind do not arise just to tease the minds of judges: they are the product of some peculiar necessity, political or otherwise. *Union Corporation Ltd.* v. *Inland Revenue Commissioners*[13] was of this kind. The facts were not such as to allow of Lord Loreburn's test being applied, and therefore some other basis of decision had to be selected. The solution chosen by the Court of Appeal appears to have been that residence arose in any country in which "to a substantial degree" acts of controlling power and authority were exercised, and in this the line of reasoning followed was avowedly adapted from the judgment of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation.*[14] It may perhaps still be open to question whether, where the facts are such that Lord Loreburn's test cannot be applied as a whole, the correct way of determining residence is, so to speak, to fragmentate his principle and establish a residence for tax purposes wherever the exercise of some portion of controlling power and authority can be identified. The point does not arise for our decision in this case, and I express no view at all upon it. I only note the decision in the *Union Corporation* case[15] as an instance of dual or multiple residence for tax purposes which has its origin in the fact that circumstances do not always make it feasible to apply the Loreburn formula.

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[8] [1906] A.C. 455.

[9] Ibid. 458.

[10] (1913) 6 T.C. 163 (H.L.); 29 T.L.R. 266.

[11] (1922) 8 T.C. 208 (H.L.).

[12] [1923] A.C. 744 (H.L.); 39 T.L.R. 590.

[13] [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 (C.A.); [1953] A.C. 482; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729 (H.L.).

The other difficulty that has appeared is the decision of this House in 1925 in the *Swedish Central Railway Co.* case.[16] To all appearances that laid down the proposition that, although there was a residence in Sweden by virtue of central control and management being exercised there, there was at the same time residence in England by virtue of incorporation here and the performance here of administrative duties such as exercising the custody of the company's seal and registration of transfers. The novel idea thus appeared that there were some circumstances that could establish residence for a company, even though its central management and control were being concurrently exercised elsewhere. Unfortunately it is impossible to discover from the decision what exactly those circumstances are, because, as so often arises under income tax procedure when judgment is given on cases stated by commissioners, the conclusion of the House involved nothing more positive than that the commissioners who had heard the case had facts before them upon which it was open to them in law to find that there was English residence. Conversely, when the case of *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*[17] reached this House in 1928, it was held that upon facts not markedly dissimilar from those of the earlier case the commissioners were entitled to find that there was no

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[14] 64 C.L.R. 15.

[15] [1952] 1 T.L.R. 651; (H.L.) [1953] A.C. 482.

[16] [1925] A.C. 495.

[17] [1929] A.C. 1.

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residence in England. With these two decisions of equal authority to be reckoned with, I think that it is impossible for anyone today to declare with any conviction what are the circumstances, or what is the combination of circumstances, that constitute residence for a company in one taxing jurisdiction at a time when the central management and control of its affairs are being actively conducted in another.

My Lords, I cannot avoid the opinion that the *Swedish Central Railway Co.* decision[18] was an unfortunate one, having regard to the course of authority both before and after its date. Few people can feel that there is any close analogy between the residence imputed to a company and the residence imputed to an individual. While it is not difficult to see that the circumstances that make an individual "resident" may reproduce themselves for him at one and the same time in more than one country, it is much harder, when a company is concerned, to feel satisfied that two quite different tests, depending upon different sets of circumstances, can each be applied concurrently for the purpose of determining residence. For any one taxing authority the relevant question is whether the company is resident within the area of its jurisdiction or non-resident: it is not required to ascertain positively whether or not the company is also resident within another jurisdiction. If the accepted test is that a company is resident in that country where its central management and control abide, and the facts are that at the material date that central management and control do not abide in England, it seems that in such cases the nature of the test itself precludes the conclusion that the company is nevertheless resident here.

I am myself of the opinion that the best way of treating the matter is to regard the *Swedish Central Railway Co.*[18] and the *Egyptian Delta Land and Investment Co.*[19] decisions as if they were in effect one decision of the House and the speech of Viscount Sumner in the later case as affording an authoritative commentary on the significance of the earlier. He was party to both of them. If this is done, much of the difficulty disappears, for it is clear that Lord Sumner wished it to be understood that the Swedish Central Railway Company's business and administration were of such a nature that what managing and controlling had to be done were in fact done as much on English as on Swedish soil. He regarded the key of the earlier decision as being contained in the words of Lord Cave[20]: "The central

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[18] [1925] A.C. 495.

[19] [1929] A.C. 1.

[20] [1925] A.C. 495, 501.

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"management and control of a company may be divided, and it "may 'keep house and do business' in more than one place; "and, if so, it may have more than one residence." On this basis the 1925 decision of the House is no more than a decision on that special class of case, such as I have already noticed with reference to the *Union Corporation*,[21] where the facts themselves are genuinely such as not to admit of a finding that central management and control are exercised in or from any one country. There will then be only one category of exception from the principle of the *De Beers* case [22] and not an undefined second class.

My Lords, what I have been saying about this question of double residence has no direct relevance to what has to be decided in the present appeal. I thought it necessary, however, to make some attempt to deal with the background because, owing to the admission that has been made asserting an African residence for the three subsidiaries, we are put in the position, if we allow the appeal, of accepting that each of them has residence in two different countries without passing upon the validity of the alleged residence in Africa or indeed knowing what are supposed to be the determining circumstances that bring it about. I do not think that satisfactory. This case ought not to be regarded as in any sense an authority on the problems of double residence for companies. It deals only with what is a different point, whether, assuming that all the acts which constitute central management and control of the subsidiaries' affairs take place in England, an English residence arises despite the fact that the persons who performed those acts had no authority under the companies' regulations to do so, nor could the meetings, if any, at which the decisions to act were taken validly be held in England. It is that point which has been argued before us.

The view which has hitherto prevailed both in the High Court and the Court of Appeal is expressed in the words which appear in the unanimous judgment of the latter court [23]: " . . . only constitutional, and therefore authorised, management and control "are relevant to an inquiry as to the residence of a company." This conclusion, at any rate at first sight, is not attractive to me, since it appears to reduce to a mere formal reading of regulations an inquiry that has generally been regarded as one of "actual "fact." It has been built out of two propositions, both of which were accepted before us by the respondent's counsel as containing the essence of his argument.

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[21] [1952] 1 T.L.R. 651; (H.L.) [1953] A.C. 482.

[22] [1906] A.C. 455.

[23] [1959] Ch. 315, 338.

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The first proposition lays stress on the consideration that none of the many judicial pronouncements which have asserted control and management to be the test of residence was directed to such circumstances as the present in which the company's own regulations conflict with what has been done. This, no doubt, is true, but I think it a very large step to deduce from that that such pronouncements, despite the unvarnished plainness of their language, can have no bearing on the issue now before us. After all, the purport of all of them is to repeat that the question where control and management abide must be treated as one of fact or "actuality," and here control and management in London remain a fact, despite the failure to adapt the companies' articles to the occasion. The articles prescribe what ought to be done, but they cannot create an actual state of control and management in Africa which does not exist in fact. In litigation inter partes this sort of situation may perhaps be brought about by the operation of the law of estoppel, but here I see no ground for saying, nor has it been argued, that there is any estoppel either by words or conduct which binds the appellants in the face of the Revenue.

Ought we, then, to adopt this principle that evidence of what has happened in fact must be excluded by a rule of law if what has been done is inconsistent with the regulations of a company? In my opinion, it would be wrong to do so. I cannot see how the corollary of such a principle could fail to be that, if you cannot look beyond what the regulations of the company provide for, it is only those regulations which need to be or indeed can be referred to when a question of residence arises. Companies could be equipped with the most comprehensive sets of constitutions providing for management to be located in this or that selected taxing jurisdiction, and, however much the written requirements were in fact departed from for reasons of convenience or otherwise, all efforts to establish the true facts relating to the actual seat of management would founder on the ground that what had been done was merely "unconstitutional." Certainly limited companies ought to keep their internal regulations up to date and to reform them in accordance with the facts. But I cannot think that such considerations are sufficient to introduce an important qualification upon this accepted test by which you try to ascertain what are the real facts about the seat of management and control and to put in its place what seems to be the merely formal device of studying a set of written regulations. I do not believe that this would conduce to the health of revenue administration. I think it much better to adhere to the approach laid down by Lord

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Loreburn in the *De Beers* case[24]: "This is a pure question of "fact to be determined, not according to the construction of this "or that regulation or bye-law, but upon a scrutiny of the course "of business and trading"; or by Lord Halsbury (*American Thread Co.* v. *Joyce*[25]): ". . . the real test . . . and that which "has been accepted as a test, is where what we should call the "head office in popular language is, and where the business of "the company is really directed and carried on in that sense."

It is said that if we admit evidence of the subsidiaries' real practice and course of business we shall make the respondent's task of revenue collection very much the more burdensome. I should be sorry to do that. Their work is difficult enough as it is: nor, indeed, is the situation of the taxpayer altogether an amiable one. But residence has hitherto been regularly treated as a question of fact as to which inquiry must be conducted, and I do not see that by rejecting the idea that the printed regulations close the matter and requiring or allowing further investigation as to what really happens we are adding materially to the respondent's burden. If this makes too elaborate a test, the proposed alternative would be altogether too simple, and much of the effective administration of revenue collection will continue to depend, as it always has, upon the measure of candour and responsibility that is shown by the individual taxpayer and his professional advisers.

I would allow the appeal.

My noble and learned friend, LORD GODDARD, asks me to say that he concurs in this opinion.

LORD COHEN. My Lords, the short point for your decision is whether three companies incorporated in Kenya, all wholly-owned subsidiaries of an English company, Alfred Booth & Co. Ltd. (which I shall hereafter call "the parent company"), were at the relevant periods resident in the United Kingdom within the meaning of subsection (9) of section 20 of the Finance Act, 1953. If they were so resident in the United Kingdom, but not otherwise, the appellant company, also a wholly-owned subsidiary of the parent company, was entitled in computing its profits for the years 1953–54 and 1954–55 to deduct certain payments (in the section called "subvention payments") made by it to the African subsidiaries in the years 1952 and 1953.

It has been throughout common ground between the parties that the African subsidiaries were at all material times resident in East Africa, but the appellant company contends that they were also resident in the United Kingdom. The admission that the African subsidiaries were resident in East Africa is not destructive of the appellant company's contention, because ever since the decision of your Lordships' House in *Swedish Central Railway Co. Ltd.* v. *Thompson* [26] it has been well established that for income tax purposes a company can simultaneously have two residences in different countries.

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[24] [1906] A.C. 455, 459.

[25] 6 T.C. 163, 165.

Both parties accepted the test of residence laid down by Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe*,[27] where he said: "The decision of Kelly C.B. and Huddleston B. "in the *Calcutta Jute Mills* v. *Nicholson* [28] and the *Cesena* "*Sulphur Co.* v. *Nicholson*,[28] now thirty years ago, involved the "principle that a company resides, for purposes of income "tax, where its real business is carried on. Those decisions have "been acted upon ever since. I regard that as the true rule; "and the real business is carried on where the central manage-"ment and control actually abides. It remains to be considered "whether the present case falls within that rule. This is a pure "question of fact to be determined, not according to the con-"struction of this or that regulation or bye-law, but upon a "scrutiny of the course of business and trading."

Relying on this citation, Mr. Heyworth Talbot, for the appellant company, said that the question where the central management and control actually abide must be a question of fact, and that the finding of the Special Commissioners (see paragraph 10 of the case stated) that the real control and management was being exercised by the board of directors of the parent company in London is conclusive in his favour.

Mr. Borneman, for the respondent, did not, I think, seriously dispute that there was evidence on which the Special Commissioners could so find. In any event, I think it is plain from the case stated as a whole that there was ample evidence to support their conclusion, and it is irrelevant whether or not your Lordships would have reached the same conclusion.

Mr. Borneman, however, submitted that the issue between the parties was not a pure question of fact. He pointed out that in none of the reported cases had the real control and management been exercised in breach of the regulations of the company,

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[26] [1925] A.C. 495.

[27] [1906] A.C. 455, 458.

[28] (1876) 1 Ex.D. 428.

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whereas in the present case the articles of each of the African subsidiaries had been so framed that it should have been impossible for the control and management, vested as it was in the respective boards of directors, to be exercised in London. Thus, in article 28 of the articles of association of Booth & Co. (Africa) Ltd., it was provided that: "Directors' meetings may be held "anywhere outside the United Kingdom and clause 81 of Table A "shall be construed accordingly." A similar provision is to be found in the articles of association of each of the other African subsidiaries.

Mr. Borneman argued, and his argument found favour with both Wynn-Parry J. and the Court of Appeal, that the observations of Lord Loreburn and of other judges in decided cases as to the acts or other elements which may determine the residence of a limited company must have envisaged such acts or other elements as being regular and not irregular, constitutionally lawful and not unlawful. Accordingly, both courts below held that since the acts of the parent company on which the Special Commissioners relied constituted a usurpation of the directing power of the African subsidiaries, such acts could not warrant the attribution to the African subsidiaries of a second residence in England.

In reaching this conclusion Romer L.J., delivering the judgment of the court, relied on the judgment of the Court of Appeal delivered by Lord Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners*.[29] He cited a passage from that judgment where Lord Evershed M.R. said: "The company may "be properly found to reside in a country where it 'really does "'business,' that is to say where the controlling power and "authority which, according to the ordinary constitution of a "limited liability company, is vested in its board of directors, "and the exercise of that power and authority, are to some sub"stantial degree to be found."

My Lords, I do not read the reference to the "ordinary "constitution of a limited liability company" as evidencing an intention to make any addition to the test indicated by Lord Loreburn in the *De Beers* case.[30] I think that all Lord Evershed M.R. was saying was that in almost every case the articles of association of a limited company vest the control of the company in the board of directors, and that, accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company.

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[29] [1952] 1 T.L.R. 651, 663.

[30] [1906] A.C. 455.

He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be if, for instance, the control was vested not in the board but in managing agents. It seems to me that in the circumstances disclosed in the case stated the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards, but, in disregard of the articles, all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but Mr. Borneman shrank from carrying his argument to this logical conclusion.

Mr. Borneman suggested that unless the application of Lord Loreburn's principle was made in accordance with the Court of Appeal's interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeal's view, if they amended the relevant articles (not a very difficult process in the case of a 100 per cent. subsidiary). Moreover, the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated.

My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted—namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners—will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and, had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion.

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For these reasons I would allow the appeal.

Lord Keith of Avonholm. My Lords, there is one point that has given me some difficulty in this case. The commissioners are not, I think, concerned with whether the powers of directors of a company are exercised in accordance with the constitution of the company. If the actings of a person or corporation are such as to attract liability to tax or give some entitlement to relief from tax, so long at least as these actings are not a façade to cover a reality which has a different result, the commissioners have, I think, no concern with the legality, or otherwise, of these actings. It is the facts of the case that have to be considered with the legal results that follow. For that reason I could not agree with the ratio of the decision of the Court of Appeal. But when the facts of this case are considered I feel considerable doubt whether they establish that the "African subsidiaries" were at the material times resident in the United Kingdom. What they show is that another company, Alfred Booth & Co. Ltd., resident in London, through its board, exercised the real management and control of the African subsidiaries. There is no suggestion that it was authorised so to do by the boards of the African subsidiaries. It is true that Alfred Booth & Co. Ltd. was the parent company and controlling shareholder of the subsidiary companies, but that does not avoid the fact that it was a different person from the African subsidiaries. I should have thought, therefore, that there might be a question whether the African subsidiaries could be said to be in any sense resident in the United Kingdom in respect that no actings of theirs could be said to show that the central management and control actually abided there. On the other hand, it is a matter of concession that the African subsidiaries have a residence in Africa, and if there is nothing to show that they have also a residence in the United Kingdom the appeal would be bound to fail. This question was not, however, raised on the appeal and did not, as I understand, enter into the decision of the Court of Appeal, and as your Lordships think that on the issues raised in this appeal the appeal should be allowed, I, with some hesitation, am prepared to agree with your Lordships.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

F. C.

[HOUSE OF LORDS.]

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Oct. 13,
14, 15;
Nov. 30.

HOCHSTRASSER (INSPECTOR OF TAXES) . APPELLANT;

AND

MAYES . . . . RESPONDENT.

Revenue—Income tax—Employment—Collateral agreement—Scheme by employer to provide housing assistance to employees—Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156 (2), *Sch.* 9, *Rules applicable to Sch. E, r.* 1.

By section 156 (2) of the Income Tax Act, 1952: "Tax under "[Schedule E] shall also be charged in respect of any office, employ-"ment or pension the profits or gains arising or accruing from "which would be chargeable to tax under Schedule D but for the "proviso to paragraph 1 of that Schedule."

Imperial Chemical Industries Ltd. was a very large company owning numerous factories in different places, and employing a very large staff, many of whom were required by their service agreements to be prepared to serve the employers wherever required. In order to assist in the housing of married male employees of certain grades, and to facilitate their transfers, the employers designed a scheme whereby they assisted by interest-free loans to a certain extent towards the purchase of houses by such staff. The scheme further provided, inter alia, that if on transfer the employee wished to sell or let his house, he was to give an option to the employers to purchase it at a fair valuation; if the option was refused, he was free to sell it, but in either case the employers guaranteed him against any capital loss, provided that the house had been maintained in good repair. Employees who accepted the scheme were required to enter into formal agreements, the terms of which were in accordance with the provisions of the scheme.

M. was employed from 1941 under various contracts with the company, requiring him to work at such of their factories as they should direct. In 1951 he entered into an agreement with them pursuant to the housing scheme. In pursuance of that agreement, he bought a house for £1,850, of which £300 was advanced to him by them by way of interest-free loan. On his transfer to another factory, he sold the house with their consent for £1,500 and they paid him £350 to compensate his loss. He was assessed under Schedule E to income tax on the latter sum:—

Held, that although the fact of employment was the causa sine qua non it was not the causa causans of the payment of £350, that it did not therefore arise therefrom, and that he was wrongly assessed (post, pp. 389, 392, 395, 397).

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

Duke of Westminster v. *Inland Revenue Commissioners* [1936] A.C. 1 (H.L.); 51 T.L.R. 467 applied.

Seymour v. *Reed* [1927] A.C. 554 (H.L.); 43 T.L.R. 584 and *Herbert* v. *McQuade* [1902] 2 K.B. 631 (C.A.); 18 T.L.R. 728 considered.

Decision of the Court of Appeal [1959] Ch. 22; [1958] 3 W.L.R. 215; [1958] 3 All E.R. 285 affirmed.

APPEAL from the Court of Appeal (Jenkins and Pearce L.JJ., Parker L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated July 7, 1958, dismissing an appeal by the appellant, Eric John Lazare Hochstrasser (Inspector of Taxes), from an order of the High Court (Upjohn J.) dated December 20, 1957, whereby an appeal by him on a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Langbourgh East in the County of York was dismissed and their determination was affirmed. The appeal related to an assessment to income tax made on the respondent, Leonard Henry Mayes, under Schedule E of the Income Tax Act, 1952, for the year 1954–55 in the sum of £1,170, which included a sum of £350 paid or credited to him pursuant to an agreement dated June 1, 1951, known as "the housing agreement" and made between Imperial Chemical Industries Ltd. (hereafter referred to as "I.C.I.") of the one part and the respondent of the other part. He was employed by I.C.I. under a service agreement at a salary which at the material time was some £820 a year.

The facts, stated by Viscount Simonds, were as follows: The respondent was a married man with two children who were born in 1949 and 1953. He had been employed by I.C.I. since 1941, at which time he lived with his parents at Welwyn in Hertfordshire. His first employment was as a laboratory assistant. In September, 1950, he was transferred to the I.C.I. works at Hillhouse in Lancashire on appointment as an assistant technical officer (chemist). During the first few months, which were a probationary period, he lived in rooms. On April 27, 1951, he entered into a service agreement with I.C.I., of which for the purpose of this case the salient feature was that he agreed to serve anywhere in the United Kingdom of Great Britain and Northern Ireland, and that I.C.I. should be at liberty to change the locality of his employment within those limits. There was also a provision that should I.C.I. require him to change his residence they would pay him such removal and other expenses incidental thereto as they should consider fair and reasonable in the circumstances, and a

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further provision that the agreement, if not otherwise previously determined, might be terminated by either party by three months' notice in writing.

It was at the time of his transfer to Hillhouse that the respondent first learned of a scheme established by I.C.I. to assist their married employees to purchase houses for their own occupation, a summary of which was given to him. At first he found trouble in purchasing a house owing to the limitations on price with which he had to comply in order to be eligible for assistance under the scheme, but in June, 1951, he purchased No. 16, Ribble Road, Fleetwood, in Lancashire, for the sum of £1,850, of which £90 was provided by himself, £1,460 was borrowed at interest on first mortgage from a building society and £300 was borrowed free of interest on second mortgage from I.C.I. This purchase was made pursuant to a so-called housing agreement. It was dated June 1, 1951, and was in the standard form for which the scheme provided. The agreement was very elaborate in character, defining with great nicety the conditions upon, and the limits within which, I.C.I. would implement the guarantee against loss upon resale which was its main purpose. Its provisions were summarised by Jenkins L.J. as follows:

"(i) In the event of the employee being transferred to a new "place of employment in the service of I.C.I. and consequently "desiring to sell or let the house, the employee must offer to sell "the house to I.C.I. If I.C.I. accepts, then the house is to be "bought by I.C.I. at the current market value ascertained by "valuation; and if such value is less than the employee's expendi"ture on the house I.C.I. becomes liable to pay the difference "to the employee. If I.C.I. declines, then the employee is at "liberty to sell to a third party and I.C.I. becomes liable to pay "the employee the amount, if any, whereby the price realised "falls short of his expenditure on the house. (See clause 2 of the "agreements.)

"(ii) In the event of the sale of the house by the employee "or his personal representatives within 12 months after (A) the "refusal by I.C.I. of an offer made on transfer under (i) above, "or (B) the retirement of the employee, or (C) the death of the "employee (whichever first happens) I.C.I. becomes liable to pay "to the employee or his personal representatives the amount if "any whereby the price realised on such sale falls short of the "employee's expenditure on the house. (See clause 3 (1).)

"(iii) If the house is not sold before the expiration of the "period of 12 months mentioned in (ii) above, then there is to be "a valuation of the house and I.C.I. becomes liable to pay to "the employee or his personal representatives the amount (if "any) whereby the employee's expenditure on the house exceeds "the amount of the valuation. (See clause 3 (2).)

"(iv) If at any time before such one of the three events "mentioned in (ii) above as shall first happen the employee while "still in the service of I.C.I. desires to sell the house he may do "so, but in that case he is only to be entitled to the benefit of "I.C.I.'s guarantee against capital loss if he obtains I.C.I.'s "consent to the sale and offers to sell the house to I.C.I. If "I.C.I. accepts the offer then the house is to be bought by I.C.I. "on similar terms to those stated in (i) above (*i.e.*, with the "benefit of the guarantee). If I.C.I. declines the offer then the "employee may sell to whom he pleases and I.C.I.'s guarantee "is to apply to any resulting capital loss. (See clause 4.)

"The agreement is to continue in force for a period expiring "12 calendar months after the death of the employee, but subject "to fulfilment of accrued rights it ceases automatically upon such "one of the following events as shall first happen, that is to say, "if the employee shall:

"(A) Be transferred for service with I.C.I. elsewhere and "offers to sell the house to I.C.I.

"(B) Retire from the service of I.C.I. on pension.

"(C) Cease to be employed by I.C.I. for any other reason.

"(D) Sell or let the property or any part thereof.

"(E) Cease to use the house as a permanent residence. (See "clause 11.)

"It is a condition precedent to I.C.I. affording to the "employee a guarantee against any capital loss he may suffer "that the employee shall at all times keep the house in good "tenantable repair. (See clause 6.)"

In October, 1954, the respondent was transferred to Wilton Works in the county of York and thereupon offered his house for sale to I.C.I. under the housing agreement. I.C.I. declined the offer and the respondent sold it with their consent for £1,500. The sum of £350 (being the loss for which I.C.I. admitted liability on resale) was duly paid or credited to the respondent by I.C.I. and he used it to pay off the money which he had borrowed. This was the sum in respect of which tax under Schedule E was claimed to be exigible from the respondent.

Paragraph 3 (G) of the case stated was as follows: "I.C.I. "have to move a great number of their staff from one part of "the country to another. The company recognises that the "transfer of a married man involves him in domestic upheaval. "Although a man might be willing to buy a house in the new "location, his chief worry was the loss he might make if he had to "sell the house. I.C.I. try to operate a staff policy which results "in a contented staff. Unless the staff are contented they do "not do their best work. I.C.I. therefore introduced the housing "scheme so that they should have employees whose minds were "eased to some extent of the worry of possible financial embar"rassment in the future arising out of the removal occasioned "by the company's action. The agreement cannot operate unless "and until the house is sold for less money than it costs to buy. "Under the housing agreement the employee cannot make a "profit as a result of the housing agreement. An employee's "salary is calculated quite independently of anything he might "receive under the housing agreement. I.C.I. salaries compare "favourably with salaries paid by other employers not operating "a housing scheme."

Upon these facts the commissioners held that the sum in question was not assessable to tax. Their reason was that the payment was to meet a capital loss incurred by the respondent in fulfilling the obligations of his employment. This was not precisely the way in which the case was subsequently presented.

John Pennycuick Q.C. and *Allan Orr* for the appellant. The sum of £350 was a profit arising from the respondent's employment, being received by or credited to him as an employee of I.C.I. and as a reward for services and for nothing else. No substantial consideration for the payment moved from him other than his services.

Every time money's worth or a sum of money is received by an employee as such, that is a profit of his employment except only in so far as the receipt is in return for full consideration in money or money's worth other than his services under the employment. Alternatively, there must be some consideration in money or money's worth. Money or money's worth received "as such" means that the employee receives it because he is an employee as distinct from payments made to him as a person, for example, for charity.

Two questions arise: (1) What is the principle to be applied in relation to collateral agreements where there is good consideration in law but not full consideration? (2) What, if any, consideration did the respondent give to I.C.I.?

On a proper analysis of the housing agreement, the sum received under it is to be treated as a perquisite or profit arising from the employment from the employee's point of view. All the cases cited by Upjohn J. were cases in which the employee undertook some further obligations or gave up certain rights vis-à-vis his employers.

There is a difference in principle between the majority of the Court of Appeal and Parker L.J. The majority say that while it is true that if there is no consideration apart from the services, or only a colourable consideration, the sum paid under the collateral agreement is a profit, if the consideration is not merely colourable, the sum is not a profit; that excludes the sum from the category of profits, so long as there is some genuine consideration, irrespective of whether there is full consideration in money or money's worth. Parker L.J. says that in the case of a collateral contract, unless there is full consideration in money or money's worth, what is received under it is a profit. The latter view is correct.

If a company operated a holiday fund under which every employee made a contribution of £5 a year and the company provided the whole cost of the holiday, there would be some consideration not merely colourable moving from the employee, but it would not be full consideration for the benefit received. That is analogous to the present case. It cannot be the law that provided there is some consideration moving from the employee, then the whole of the benefit received by him is not a profit of the office. Again, a company might have a scheme under which it undertook to pay the rent of any employee living within 10 miles of its works. There would be some consideration in the consequent advantage to the company, but the obligation on the employees would not represent full consideration in money or money's worth for the payment of their rent. Where there is some genuine consideration, but it is plainly inadequate, the court must make an apportionment as best it can.

Here there is no consideration in money or money's worth. The only positive obligation on the respondent is to give I.C.I. the first refusal of the house. That is no pecuniary detriment to him, since it is a first refusal at market value. One must look at the matter from his point of view. It is irrelevant that the bargain is in form a bargain made at arm's length. The only question is: how does the contract stand from the point of view of the employee? Unless the employee gives up something in order to get what he gets, the receipt is a profit. What the employer is getting is the service of a man whose mind is free from anxiety as to his house.

To be recouped a loss by someone else is plainly a profit. If a man buys a car for £1,000 and sells it for £500 and his employer makes up his loss, that is a profit to the employee. The same is true if an employer makes up his employee's losses on Stock Exchange transactions or pays his income tax.

If there was a covenant in a service agreement to make good the loss on the resale of a house, a payment made under it would be a profit. It makes no difference that the covenant is in a subsequent collateral contract. Parker L.J. put the principle of law correctly in the Court of Appeal in this case,[1] and he was right in his succeeding observations on the effect of the housing agreement.

A familiar line of authorities distinguishes between payments made to an employee as such and payments made to him as an individual and not as an employee. *Herbert* v. *McQuade*,[2] *Blakiston* v. *Cooper*[3] and *Seymour* v. *Reed*[4] do not help much beyond general statements. See also *Moorhouse* v. *Dooland*[5] and *Bridges* v. *Hewitt*, *Same* v. *Bearsley*,[6] but they do not advance the argument very much, since in neither of these cases was the court concerned with collateral contracts. In *Hartland* v. *Diggines*[7] an employer paid an employee's income tax wholly voluntarily. See also *Nicoll* v. *Austin*.[8]

There is no principle that payments made under such a collateral contract as this are not chargeable to tax, irrespective of whether there is some consideration only or full consideration. That is not established by any of the cases relied on by the respondents. In *Dewhurst* v. *Hunter*[9] and *Cameron* v. *Prendergast*,[10] cases of lump sums paid to company directors, it could not be said that the payments were made in respect of their offices. *Beak* v. *Robson*[11] is a similar case.

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[1] [1959] Ch. 22, 56; [1958] 3 W.L.R. 215; [1958] 3 All E.R. 285.

[2] [1902] 2 K.B. 631, 649, 650–651 (C.A.); 18 T.L.R. 723.

[3] [1909] A.C. 104, 106–107 (H.L.); 25 T.L.R. 164.

[4] [1926] 1 K.B. 588, 593; 42 T.L.R. 377; [1927] 1 K.B. 90, 107 (C.A.); 42 T.L.R. 514; [1927] A.C. 554, 559 (H.L.); 43 T.L.R. 584.

[5] [1955] Ch. 284, 303–304 (C.A.); [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93.

[6] [1957] 1 W.L.R. 674, 691, 695 (C.A.); [1957] 2 All E.R. 281.

[7] [1926] A.C. 289 (H.L.); 42 T.L.R. 262.

[8] (1935) 19 T.C. 531.

[9] (1930) 145 L.T. 225, 229; (1931) 145 L.T. 225, 233 (C.A.); (1932) 146 L.T. 510, 515, 518 (H.L.).

[10] (1939) 160 L.T. 210, 211 (C.A.); [1939] 1 All E.R. 223; [1940] A.C. 549, 557–558 (H.L.); 56 T.L.R. 499; [1940] 2 All E.R. 35.

A payment made to all employees is a profit of the office and is not given to any employee in his personal capacity. If the facts were that the company had requested the employee to buy a house, and he had done so on the faith of the scheme, that would be different from the present case. One would have to see whether from the point of view of the employee he had given full consideration. But purchasing a house of one's own volition could never be consideration moving to the employer.

As to payments to directors, see also *Tilley* v. *Wales*,[12] which indicates that if there is some real consideration moving from the employee, though it is insufficient to balance the benefit moving from the employer, there may be an apportionment between the taxable and non-taxable parts of what is received.

As a matter of principle and common sense a payment made under a collateral contract without any consideration in money or money's worth must be in the same position as a purely voluntary payment. It cannot make any difference that the obligation to make a payment is contained in a collateral document under which there moves from the employee some consideration which is good consideration but which is not full consideration in money or money's worth moving to the employer.

The principle which the taxpayer seeks to assert here means that an employer can always make payments to an employee in recoupment of losses without their being taxable. The repercussions would be considerable.

There is nothing in the facts to suggest that I.C.I. was receiving any financial benefit except that of having a contented staff. The idea of its having a pool of houses at its disposal is not mentioned in the case stated. The effect of the agreement is to confer benefit on the employees without any consideration in money or money's worth on their part. Therefore any sum paid to one of them under the agreement is a profit of his employment.

Alan Orr following. The option which the respondent conferred on I.C.I. could never be a detriment to him, since the price paid by I.C.I. would be the highest price. The restriction on letting was not a detriment to him. Any potential rental value would enter into the price valuation in any event, since one class of buyer to be considered on a valuation must be a person buying the house for letting.

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[11] [1942] 2 K.B. 149, 150 (C.A.); [1942] 1 All E.R. 639, 640–641; [1943] A.C. 352, 355 (H.L.); 59 T.L.R. 90; [1943] 1 All E.R. 46.

[12] [1942] 2 K.B. 169, 173 (C.A.); [1942] 2 All E.R. 22; [1943] A.C. 386, 393, 395–396 (H.L.); 59 T.L.R. 178; [1943] 1 All E.R. 280.

F. N. Bucher Q.C. and *H. H. Monroe* for the respondent. The sum credited to the respondent pursuant to the housing agreement was not a salary, fee, wage, perquisite or profit of his employment.

The appellant argued that whenever a sum of money is received by an employee as such, that is a profit of his employment except in so far as the receipt is in return for full consideration in money or money's worth other than his services under the employment. If the words "as such" mean "by way of "remuneration for his services," then the proposition is true without any need for the exception, but, if they do not mean that, the remainder of the proposition is fallacious. Here the consideration moving from the respondent for the sum received was a consideration other than services rendered or to be rendered. Even if (contrary to the respondent's contention) the housing agreement was wholly for the employee's benefit, it does not follow that a payment under that agreement is made in respect of services. The payment was made to the respondent otherwise than as an employee. It was made to the respondent who had a particular house and had entered into a particular agreement about it. He is identifiable, not because he was an employee, but because he was a party to this agreement about this house. His services were not the causa causans of the payment.

The respondent adopts what Jenkins and Pearce L.JJ. said in the Court of Appeal.

It is not true to say that, if the House of Lords does not accept the appellant's propositions, sums paid by an employer to an employee in recoupment of losses can never be taxable. The question will always be: Is the payment for services or is it not? The onus in this should not be shifted onto the taxpayer. On the facts of this case there was sufficient consideration for the payment.

Where an agreement stipulates for a consideration other than services and is bona fide, one is not entitled to infer from the circumstances that the services are the consideration under it: see *Inland Revenue Commissioners* v. *Duke of Westminster*,[13] which is a fortiori the present case and with which the appellant's case is inconsistent.

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[13] [1936] A.C. 1 (H.L.); 51 T.L.R. 467.

In considering whether all the facts point to the conclusion that this payment was or was not made for the services of the respondent, one does not look outside the contract, in this case the housing agreement. If it is unambiguous in its tenor, and the services of the employee who is a party to the contract are separately remunerated, there is no question of weighing up the consideration moving from the employee to the employer or of making any apportionment, which, in any event, would be impossible. The appellant is wrong in contending that unless this sum is paid for full consideration it is taxable.

It is not accepted that this agreement is all beneficial to the employee. I.C.I. would be able to prevent him from building a garage for a car for his family. The terms of the agreement were conceived for the benefit of I.C.I. and not of the employee. The status of the respondent and of other married men on the staff must be an object of particular concern to I.C.I. At the time the agreement was entered into it was impossible to estimate the state of the housing market at an uncertain date and so one could not say what would be the value of this agreement to the employee.

The respondent's salary was calculated independently of the housing agreement. The onus must be on the Crown to show that something paid under the housing agreement and not expressed to be in respect of the contractual services was in fact paid for services. The housing agreement is something which a benevolent employer with an eye to his own advantage would produce for his employees.

Nicholl v. *Austin*[14] is different from the present case; the dispute there was whether the tax was under Schedule E or Schedule D.

The salary which the respondent received was calculated independently of the housing scheme, which only applied to persons who fulfilled certain conditions. The respondent in certain respects altered his position for the worse in law by entering into the agreement. The fact that one agreement might operate after the other had ended emphasises the separateness of the service agreement and the housing agreement.

H. H. Monroe following. The consequences of the decision in the *Westminster* case[15] were dealt with by section 28 of the Finance Act, 1946 (now section 415 of the Income Tax Act, 1952).

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[14] 19 T.C. 531.

[15] [1936] A.C. 1.

Suppose the respondent's house had gone up in value when he wanted to move. If he had offered it to I.C.I. he might have received a sum in excess of what he paid for it, thereby making a profit. Yet on the logic of the Crown's argument that sum would not have been taxable because the sale would have been for full consideration. The housing agreement was about this particular house and not about the respondent's services, and the character of the agreement has not changed because the house was sold at a loss. It is not a case of an employer undertaking to stand the loss in relation to a piece of property; the employer also acquires some real rights in relation to the house.

John Pennycuick Q.C. in reply. Every receipt in money or money's worth which is received by an employee as such is a profit of his office, save in so far as it is received for full consideration in money or money's worth, and is taxable under Schedule E. That is true of the case of a collateral contract. If it were held that there had been, not full but partial, consideration in money or money's worth, then the taxpayer would have been entitled to a reduction by way of apportionment. But here no such contention has hitherto been submitted to the courts and it is too late to ask for an apportionment now.

In the *Westminster* case [15] the contention for the Crown was that the sums there in question represented wages and so were not annual payments which could be made under deduction of tax and were not deductible in calculating surtax liability. The House of Lords held that the payments, which were made under a deed of covenant, did not represent wages. As to the effect of a covenant in a deed to pay wages, see what Finlay J. said in the *Westminster* case.[16]

Here one must look at the housing agreement to see what the employee is giving. If he is giving nothing under it, what he receives must be a profit of his office. The same applies if he is giving a nominal consideration. Nothing will do but full consideration determined in the light of all the surrounding circumstances. There is no general principle the effect of which is that any payment under a collateral agreement is not a profit of the office. The housing agreement was made with the respondent as an employee and not as a personal gesture to him. This is not like a payment to an employee for an injury, which might be rather a solatium than a return for services. Such a situation throws no light on the present case.

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[15] [1936] A.C. 1.

[16] (1934) 151 L.T. 489, 492.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, the question at issue in this appeal is whether the respondent, who was at all material times an employee of Imperial Chemical Industries Ltd. (I.C.I.), was rightly assessed under Schedule E of the Income Tax Act, 1952, in the sum of £1,170, which included a sum of £350 paid to him in circumstances to be now stated.

I will first remind your Lordships of the relevant statutory provisions.

It is by section 156 of the Income Tax Act, 1952, provided as follows:

"The Schedule referred to in this Act as Schedule E is as "follows—

"Schedule E

"1. Tax under this Schedule shall be charged in respect of "every public office or employment of profit. . . .

"2. Tax under this Schedule shall also be charged in respect "of any office employment or pension, the profits or gains arising "or accruing from which would be chargeable to tax under "Schedule D but for the proviso to paragraph 1 of that "Schedule. . . .

"5. The provisions set out in Schedule IX to this Act shall "apply in relation to the tax to be charged under this Schedule."

Schedule IX, so far as relevant, was as follows:

"Rules Applicable To Schedule E

"1. Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect of "all salaries, fees, wages, perquisites or profits whatsoever there-"from for the year of assessment, after deducting the amount of "duties or other sums payable or chargeable on the same by "virtue of any Act of Parliament, where the same have been "really and bona fide paid and borne by the party to be charged."

I will now refer to the facts of the case, which I must do by reference to the case stated by the Commissioners for the General Purposes of the Income Tax, using so far as possible their own language. [His Lordship stated the facts and continued:]

Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage

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which appears to me to sum up the law in a manner which cannot be improved upon. "In my judgment," he said,[1] "the "authorities show this, that it is a question to be answered in "the light of the particular facts of every case whether or not a "particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in "money or money's worth and personal presents, in my judgment "not every payment made to an employee is necessarily made "to him as a profit arising from his employment. Indeed, in my "judgment, the authorities show that to be a profit arising from "the employment the payment must be made in reference to the "services the employee renders by virtue of his office, and it must "be something in the nature of a reward for services past, present "or future." In this passage the single word "past" may be open to question, but apart from that it appears to me to be entirely accurate. Applying the law thus stated to the facts of the present case, the learned judge held that the sum of £350 was not a profit "therefrom," that is, arising from the office or employment.

In the Court of Appeal the same view was taken by Jenkins and Pearce L.JJ. Parker L.J. (as he then was) came to a different conclusion, and for that reason (and in deference to the argument of learned counsel) I must deal somewhat more fully with the case than I should otherwise have thought necessary. At the outset the learned Lord Justice stated the relevant principle of law thus[2]: "Where you find that an employee has "during the course of his employment received from his employer "a benefit in money or money's worth, that receipt is a profit "of his employment and taxable as such unless (1) it amounts "to a gift to him in his personal capacity, e.g., a benefit "conferred out of affection or pity; or (2) it has been received for "a consideration other than the giving of services." And he goes on to point out that in these two exceptions, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services—a distinction which, abandoning the vernacular, as Younger L.J. had in an earlier case, Pearce L.J. describes by saying[3] that the employment in such a case is a causa sine qua non of the benefit but not the causa causans. Parker L.J. then examines the facts of the case and comes to a conclusion which he expresses in these words[4]: "Bearing these considerations in mind I find it quite impossible "to arrive at any conclusion other than that there is no sub"stantial consideration apart from services." This, put in other words, is a finding that the substantial consideration for the payment by I.C.I. of £350 to the respondent was the rendering of service by him.

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[1] [1959] Ch. 22, 33; [1958] 2 W.L.R. 982; [1958] 1 All E.R. 369.

[2] [1959] Ch. 22, 54–55; [1958] 3 W.L.R. 215; [1958] 3 All E.R. 285.

[3] [1959] Ch. 22, 61.

My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the causa causans, or only the sine qua non, of benefit, which perhaps is only to give the natural meaning to the word "therefrom" in the statute, it must often be difficult to draw the line and say on which side of it a particular case falls. But I think that the approach should not be exactly that of Parker L.J. It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it. Thus, in the present case it is for the Crown to establish that a payment made under the housing agreement is a reward for the employee's services. Let me interpolate that the addition of the words "as such" adds nothing to the proposition. How, then, does the Crown seek to prove its case? It does not, and could not, suggest that the agreement is in any way colourable. Nevertheless it is driven to the argument that a payment made under it is a reward for services and nothing else. This argument it fortifies by a close analysis of the benefit or detriment accruing to or suffered by the employee, and concludes that no substantial consideration for the payment moves from the employee.

My Lords, I altogether dissent from this argument and conclusion. There is nothing express or implicit in the agreement which suggests that the payment is a reward for services except the single fact of the relationship of the parties, and it is clear enough from *Inland Revenue Commissioners* v. *Duke of Westminster*[5] that that fact alone will not justify such a conclusion. On the other hand, there is the significant fact that the salary earned by the employee compares favourably with salaries paid by other employers not operating a housing scheme, and is the same whether or not he takes advantage of the housing scheme. This at once suggests that there is some other reason for the payment than services rendered or to be rendered. Nor, though it was little stressed by the respondent, can I ignore his particular status as a married man peculiarly in need of housing accommodation, which made him, with other married employees, an object of particular concern to his employers. In these circumstances, I should be disposed to say that the Crown has failed to make a case and leave the matter there. For, assuming, as I must assume, that the agreement is not colourable, I doubt whether it is relevant to ask what, if any, consideration moved from the employee and whether it was substantial or sufficient or what you will. Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain and, as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject "the lore of nicely calculated less or more."

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[4] [1959] Ch. 22, 56–57.

[5] [1936] A.C. 1 (H.L.); 51 T.L.R. 467.

My Lords, in the course of the argument a considerable number of authorities were cited, some of them decisions of this House. In nothing that I have said have I intended to cast any doubt upon them. I should not be justified in doing so. But I do not apologise for going back to the very words of the statute and ignoring explanatory words like "as such," nor do I think it useful to examine whether an agreement under which payment is made is "collateral." The question is one of substance, not form. I accept, as I am bound to do, that the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office: see *Seymour* v. *Reed* [6] and *Herbert* v. *McQuade*.[7] I do not doubt that a taxable profit may take the form of the discharge of an employee's obligation as well as of a direct payment: cf. *Hartland* v. *Diggines*,[8] nor that a lump-sum payment to directors may in some circumstances, just as in other circumstances it may not, be subject to tax. Here fine distinctions have been made which are not directly relevant to the present case. Again, there may well be cases, of which *Nicoll* v. *Austin* [9] is an example, where a managing director or other officer of a company is taxable in respect of the outgoings of a house occupied by him which are discharged by the company. Such cases may be near the line, as may cases in which the question is whether a payment is made to an employee as a reward for his services or (to use the words of Parker L.J.'s exception) is made out of affection or pity.

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[6] [1927] A.C. 554 (H.L.); 43 T.L.R. 584.

[7] [1902] 2 K.B. 631 (C.A.); 18 T.L.R. 723.

[8] [1926] A.C. 289 (H.L.); 42 T.L.R. 262.

[9] (1935) 19 T.C. 531.

But having said that, my Lords, I must add that, in my opinion, there is little doubt on which side of the line the present case falls. It was not established by the facts found by the commissioners, nor was it a legitimate inference from those facts that the sum of £350 paid to the respondent was a reward for his services. The appeal should, in my opinion, be dismissed with costs.

LORD RADCLIFFE. My Lords, I have had the opportunity of reading in advance the speech which has just been delivered by my noble and learned friend. I agree with his conclusion that this appeal ought to be dismissed, and I agree with the reasons which he advances for his opinion. It is not necessary, therefore, that I should say more than a few words as to what I regard as the determining consideration in this case.

It is, as he says, near the line. I do not imply by that that I find any particular difficulty in deciding upon which side of the line it lies; but it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, in another instance is not, a "perquisite "or profit . . . therefrom."

The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such." It has been said that it must have been made to him "in his capacity of employee." It has been said that it is assessable if paid "by way of remuneration for his services," and said further that this is what is meant by payment to him "as such." These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which are in question here were paid to the respondent for acting as or being an employee that I regard them as not being profits from his employment.

The money was not paid to him as wages. The wages of employees are calculated independently of anything which they get under the housing scheme, and the I.C.I. salaries compare favourably with salaries paid by other employers in the chemical industry who do not operate a housing scheme. We are bound to say on the facts found for us that the source of the £350 was the housing agreement into which the respondent had entered on June 1, 1951, and that the circumstance that brought about his entitlement to the money was not any services given by him but his personal embarrassment in having sold his house for a smaller sum than he had given for it.

I regard the employer's payment as being in substance a free benefit conceded to the employee. It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What it wanted was to ease the mind and mitigate the possible distress of an employee who, having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back. To me, therefore, it seems beside the point to scrutinise the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee under the agreement. I should have taken the same view of the result if he had afforded none.

The essential point is that what was paid to him was paid to him in respect of his personal situation as a house-owner, who had taken advantage of the housing scheme and had obtained a claim to indemnity accordingly. In my opinion, such a payment is no more taxable as a profit from his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance.

My Lords, I said at the beginning that I thought this case was near the borderline. I have tried to indicate clearly why I do not regard the payment as falling on the side of taxability. On the other hand, I do not find in this decision any qualification of the principle that an employer who pays an employee's personal bills as part of his reward for services rendered is paying a taxable wage or profit under Schedule E. That is a different case.

LORD COHEN. My Lords, the facts have been sufficiently stated by the noble and learned Lord on the Woolsack, and I need not repeat them. The question for your Lordships' decision is whether the respondent is liable to income tax under Schedule E on the sum of £350 which he received, not under his service agreement with Imperial Chemical Industries Ltd., but under an indemnity contained in the housing agreement entered into between him and the company when, on his transfer to Hillhouse, he bought a house to accommodate himself and his family and received assistance from I.C.I. in the purchase thereof, and an indemnity in certain events against loss on the resale of it for less than the purchase price.

The Crown claimed tax on this sum of £350 as being due under Schedule E in respect of his office or employment with I.C.I. The relevant provision of the Rules applicable to Schedule E is contained in paragraph 1 of Schedule IX, which provides that: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E . . . in respect of all salaries, fees, "wages, perquisites or profits whatsoever *therefrom*" (the italics are mine).

This claim has been rejected by the General Commissioners, by Upjohn J. and by a majority of the Court of Appeal but on somewhat different grounds. The commissioners rejected it on the ground that the payment was to meet a capital loss and was therefore not assessable to income tax. Upjohn J. adopted the statement of the law by Morris L.J. in *Bridges* v. *Hewitt*, *Same* v. *Bearsley*,[10] where the learned Lord Justice said: ". . . the fact "that someone who receives a benefit is the holder of an office "does not by itself prove that what he received was a profit from "the office. That has to be decided by considering on the "evidence whether what was received was received as remunera-"tion for services rendered in the office." Accepting this as the true test, Upjohn J. came to the conclusion that the sum of £350 now in question was not a profit. It was, he said, something which was wholly collateral and really had nothing to do with the office or the services which the respondent was bound to render to his employers.

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[10] [1957] 1 W.L.R. 674, 698 (C.A.); [1957] 2 All E.R. 281.

Jenkins and Pearce L.JJ. in the Court of Appeal reached the same conclusion, but Jenkins L.J. examined the proposition that Mr. Pennycuick advanced on behalf of the Crown in the Court of Appeal and before us, and said that he was prepared to accept that proposition but that even so, on the facts of the case before him he was satisfied that the Crown's appeal failed. The proposition in its final form before us was that an employee is liable to pay tax under Schedule E on everything received by the employee as such, unless it is received for full consideration in money or money's worth other than services as employee.

My Lords, I confess the words "as such" cause me some difficulty. They have been used more than once by learned judges in reported cases; for instance, by Morris L.J. in *Bridges* v. *Hewitt*,[11] when after citing from Schedule IX to the Act the words "in respect of all salaries, fees, wages, perquisites or "profits whatsoever therefrom for the year of assessment," he said: "The word 'therefrom' must be construed in its context. "A profit accruing by reason of holding an office or employment "may be a profit 'therefrom.' This may be so even though "some payment which is received is not made by the employer "of the recipient and even though the payment is made voluntarily. The profit need not necessarily be in the form of a cash "payment. The conception which is introduced by the word "'therefrom' is that some taxable remuneration may accrue to a "person by reason of his having or exercising an office or employment of profit. The reference is to what is received by the "holder of an office or employment in that capacity: to the holder "of the office or employment as such."

My Lords, I am prepared to accept that statement of the law, but it is, I think, clear from the final conclusion of Morris L.J. in the case last cited, and from the decisions cited by Jenkins L.J. in his judgment in the present case (see especially *Beak* v. *Robson*,[12] *per* Lord Simon, and *Cowan* v. *Seymour*,[13] *per* Younger L.J.) that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The court must be satisfied that the service agreement was the causa causans and not merely the causa sine qua non of the receipt of the profit.

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[11] [1957] 1 W.L.R. 674, 691.

[12] [1943] A.C. 352 (H.L.); 59 T.L.R. 90; [1943] 1 All E.R. 46.

[13] [1920] 1 K.B. 500 (C.A.); 36 T.L.R. 155.

My Lords, on the facts of the present case I am satisfied that Jenkins L.J. was right when he said[14]: "I think it may "well be said here that while the employee's employment by "I.C.I. was a causa sine qua non of his entering into the housing "agreement and, consequently, in the events which happened, "receiving a payment from I.C.I., the causa causans was the "distinct contractual relationship subsisting between I.C.I. and "the employee under the housing agreement, coupled, of course, "with the event of the declining in value."

Parker L.J. did not, I think, differ from his brethren as to the principles of law applicable to the case; he differed only on the application of those principles to the facts of the case, for he said[15]: "I find it quite impossible to arrive at any conclusion "other than that there is no substantial consideration apart from "services" for the indemnity against loss.

My Lords, I differ from this conclusion. It is clear from the finding of the commissioners that the respondent was receiving under his service agreement the full salary appropriate to the appointment he held: the housing scheme pursuant to which the housing agreement was made was introduced by I.C.I. not to provide increased remuneration for employees but as part of a general staff policy to secure a contented staff, and to ease the minds of employees compelled to move from one part of the country to another as the result of the company's action. The housing agreement itself gave advantages to the company which may not be easy to qualify but which are not negligible or colourable. For these reasons, as well as for the reasons given by the noble and learned Lord on the Woolsack, I agree with Jenkins L.J. that the housing agreement constituted a genuine bargain advantageous, no doubt, to the respondent, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payment sought to be taxed in this appeal.

I would dismiss this appeal.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD DENNING. My Lords, Mr. Mayes is a married man with two children. He has for many years been employed by Imperial Chemical Industries Ltd. under a service agreement at a salary which at the material time was some £820 a year. It was provided by the agreement that if his employers wished to transfer him from one part of the country to another, they were at liberty to do so, but in that event they were to pay his removal expenses. He was first employed at Welwyn in Hertfordshire, but later he was transferred by the company to Hillhouse in Lancashire. In 1951 he found a house in Lancashire suitable for his needs at a price of £1,850. He had only £90 of his own, so he had to borrow the rest on mortgage. A building society lent him £1,460 at interest and his employers lent him £300 free of interest. Imperial Chemical Industries Ltd. had a housing scheme to help employees placed as he was; and it was under this scheme that they lent him the £300. His employers also agreed that, if he were to be afterwards transferred to any other part of the country, and so had to leave the house, they would guarantee him against any loss or depreciation on it. The detailed terms were set out in a housing agreement. Three years later Imperial Chemical Industries Ltd. transferred him to Wilton in Yorkshire and he had to leave the house. He sold it at a loss. He had paid £1,850 for it but he only sold it for £1,500. So he incurred a loss of £350. His employers, Imperial Chemical Industries Ltd., were bound under the housing agreement to indemnify him against this loss and they did so. They paid him £350. He used it to pay off the money he had borrowed, so he made nothing out of it at all. The Crown now claim that this £350 is a profit from his employment and taxable under Schedule E.

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[14] [1959] Ch. 22, 53–54.

[15] Ibid. 57.

My Lords, tried by the touchstone of common sense—which is, perhaps, rather a rash test to take in a revenue matter—I regard this as a plain case. No one coming fresh to it, untrammelled by cases, could regard this £350 as a profit from the employment. Mr. Mayes did not make a profit on the resale of the house. He made a loss. And even if he had made a profit, it would not have been taxable. How, then, can his loss be taxable, simply because he has been indemnified against it? I can readily appreciate the case which was put in argument—namely, that if an employer, by way of reward for services, agrees to indemnify his employee against his losses on the Stock Exchange, the payments which the employee received under the indemnity would be taxable. But that would be because the losses were his own affair and nothing to do with his employment: the payments of indemnity would there be a straight reward for services. This payment of £350 was nothing of that kind. It was a loss which Mr. Mayes incurred in consequence of his employment and his employers indemnified him against it. I cannot see that he gets any profit therefrom. If Mr. Mayes had been injured at work and received money compensation for his injuries, no one would suggest that it was a profit from his employment. Nor so here, where all he receives is compensation for his loss.

Why, then, if this case is as plain as I think it is, has it got so far as to reach your Lordships' House? Only, I suggest, because of a broad proposition which the Crown advanced about "profits." This proposition was put forward almost as if it were a definition of what the law regards as the "profits" of an employment. It was supported with quite a show of authority. So much so that the Court of Appeal were induced to accept it as correct—though the majority, to be sure, refused to hold that it applied in this case. I need hardly say that, if there were available to your Lordships a definition of "profits," it would be a pearl of great price. But I am afraid that this pearl turned out to be cultivated and not real. It was culled from the cases and not from the statute. It did not survive the critical examination of your Lordships. When subjected to close scrutiny, it was found to be studded with ambiguities and defaced by exceptions. It would, if accepted, put a greater burden on the taxpayer than ever the statute warrants, and it would introduce more confusion into a subject where enough already exists.

I would ask your Lordships, therefore, to put on one side the proposition submitted by the Crown and to go back to the words of the statute. I do not find much help in any of the previous decisions: and the speeches in them cannot rule the day. They show the way in which judges look at cases, and in that sense are useful and suggestive, but in the last resort each case must be brought back to the test of the statutory words.

So tested the question simply is: Was this £350 received by Mr. Mayes a "profit" from his employment? I think not, for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word. I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1959
Nov. 5, 9, 10;
Dec. 14.

PUBLIC TRUSTEE . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Estate duty—Property chargeable—Property deemed to pass—Meaning of "deemed"—Bequest to trustee for life of income from shares of residue—" . . . so long as he shall act as trustee . . . by way "of remuneration"—Duty claimed on death of trustee on capital of share—Whether exempted as income received "only . . . as holder of "an office"—Scope of exempting provisions—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*), (2), (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

Judicial Precedent—House of Lords decision—Dictum long treated as correct—Patently wrong—Relevance of subject of discussion.

Judicial Precedent — Statute — Construction — Different situation — Whether different construction permissible.

Statute—Construction—Meaning of words—Ordinary meaning to be applied.

By section 1 of the Finance Act, 1894 (as amended by the Finance Act, 1946): "In the case of every person dying after the "commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal "value ascertained as hereinafter provided of all property, real or "personal, settled or not settled, which passes on the death of such "person a duty called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in Schedule I "of this Act shall not be levied in respect of property chargeable "with such estate duty."

By section 2: "(1) Property passing on the death of the deceased "shall be deemed to include the property following, that is to "say:—(*a*) Property of which the deceased was at the time of his "death competent to dispose; (*b*) property in which the deceased or "any other person had an interest ceasing on the death of the "deceased, to the extent to which a benefit accrues or arises by the "cesser of such interest; but exclusive of property the interest in "which of the deceased or other person was only an interest as "holder of an office, or recipient of the benefits of a charity, or "as a corporation sole . . . (2) Property passing on the death of "the deceased when situate out of the United Kingdom shall be "included only, if under the law in force before the passing of this "Act, legacy or succession duty is payable in respect thereof, or

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

"would be so payable but for the relationship of the person to "whom it passes. (3) Property passing on the death of the deceased "shall not be deemed to include property held by the deceased as "trustee for another person under a disposition not made by the "deceased more than five years before his death where possession "and enjoyment of the property was bona fide assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any "benefit to him by contract or otherwise."

A testator gave to one of the trustees of his will the income of certain shares of his residuary estate "during his life so long as he "shall act as executor and trustee of this my will by way of "remuneration for so doing. . . ." On the death of the trustee estate duty was claimed under section 1 of the Act, as property passing on the death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an "office," and that it therefore came within the exemption from duty in section 2 (1) (*b*):—

Held (Lord Keith of Avonholm dissenting), that the property in question should not be charged to estate duty.

Section 1 of the Act imposed the charge in general terms and section 2, by exclusion and inclusion, defined the precise area of that charge. The two sections were not mutually exclusive and the exempting words of section 2 (1) (*b*) were operative with regard to property which fell within that subsection, even though that property might also fall within the words of section 1 (post, pp. 408, 416, 418, 427). The trustee's trusteeship was an office, and his beneficial interest in the property was in respect of that office (post, p. 416).

Dictum of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198, 212; 15 T.L.R. 270 disapproved.

In re Duke of Norfolk [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 2 All E.R. 851 considered.

Observations of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14 considered.

Decision of the Court of Appeal [1958] Ch. 865; [1958] 3 W.L.R. 163; [1958] 2 All E.R. 720 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal by the appellant, the Public Trustee, from an order dated June 26, 1958, of the Court of Appeal, affirming an order of the Chancery Division of the High Court of Justice (Danckwerts J.) made on February 13, 1958, on an application by the appellant by originating summons dated November 19, 1957, and issued pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, to have a question of liability to estate duty determined.

The questions at issue were whether or not on the true construction of the will dated March 22, 1919, of the late Alfred Charles William, Viscount Northcliffe, the interest of the late Henry Preuss Arnholz in part of Lord Northcliffe's residuary estate was, as the Public Trustee contended, only an interest as holder of an office, and, if so, whether, contrary to the Public Trustee's contention, estate duty became payable in respect of Mr. Arnholz's death on that part of Lord Northcliffe's residuary estate.

At the date of his death on August 31, 1955, Mr. Arnholz was, in the events which had happened, entitled to a fractional share amounting to 3/49½ of the income of Lord Northcliffe's residuary estate. This he enjoyed under a bequest in clause 6 (26) of Lord Northcliffe's will to him "during his life so long as "he shall act as executor and trustee of this my will by way "of remuneration for so doing." The Public Trustee was the executor of the estate of Mr. Arnholz.

John Pennycuick Q.C. and *J. A. Wolfe* for the appellant. The enjoyment of Mr. Arnholz was that of a holder of the office of trustee, and so, on the true construction of the will, his "was "only an interest as holder of an office" within section 2 (1) (*b*) of the Finance Act, 1894. Section 1 of that Act is the only charging section and it charges property which passes on the death of a person. Section 2 provides that the subject-matter comprised in "property passing on the death of the deceased" shall be treated as including certain categories of property, whether or not the items within them actually pass on the death.

The difficulty in the present case arises from what Lord Macnaghten said in *Earl Cowley* v. *Inland Revenue Commissioners*.[1] His explanation of the relationship between sections 1 and 2 is unacceptable and is not binding on the House, because it was unnecessary for the decision of the case. On the true construction of the Act as a whole, the property comprised in section 2 (1) (*a*) includes property which on the death of the deceased passes under section 1, particularly property to which the deceased was absolutely entitled: see also sections 6 (2), 8 (3) and 22 (2) (*a*). Similarly, property passing under section 2 (1) (*b*) includes property which on the death of the deceased

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[1] [1899] A.C. 198, 212 (H.L.); 15 T.L.R. 270.

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passes under section 1, particularly property of which the deceased was life tenant. So the property set out in section 2 (1) includes some or all of the property which falls within section 1 unaided by section 2 (1). Section 1 charges property which actually passes, and section 2 treats as passing certain classes of property which may or may not actually pass. "Actually "passing" means that the whole of the item of property changes hands, as opposed to some interest in it ceasing or arising. Lord Macnaghten's observation was only a dictum made without argument on the point by counsel. In no subsequent case has the principle enunciated in the dictum formed a necessary part of the decision of the court. A decision in the appellant's favour in this case cannot affect any previous authority. In *Sanderson* v. *Inland Revenue Commissioners* [2] Lord Radcliffe considered the dictum and criticised it. Accordingly, the House of Lords should reconsider the relationship of sections 1 and 2.

The words "property of which the deceased was at the time "of his death competent to dispose" in section 2 (1) (*a*) cannot be given an effect to accord with Lord Macnaghten's dichotomy. Nor can the words in paragraphs (*b*), (*c*) or (*d*). Read with the rest of the Act, sections 1 and 2 cannot be treated as mutually exclusive. A study of *Cowley's* case [3] indicates that what Lord Macnaghten said was a mere dictum. Some light is thrown on that case by the fourth reason in the printed case of the appellant Earl Cowley to the effect that "on the death of the second Earl, "the only property in which the deceased had an interest ceasing "on the death of the deceased within section 2 (1) (*b*) of the "Finance Act, 1894, and in which a benefit accrued or arose by "the cesser of such interest, was the equity of redemption in the "Mornington estates subject to the mortgage for £230,000." In *Attorney-General* v. *Dobree* [4] what Lord Macnaghten had said was criticised and the sections were put into their proper relationship.

The charge is only under section 1. The subject-matter of the charge is property passing on the death of the deceased. One may have property which changes hands on the death of the deceased, and so "passes" in the ordinary and natural meaning of the word. Section 2 does not operate by the mere addition of certain items.

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[2] [1956] A.C. 491 (H.L.); [1956] 2 W.L.R. 48; [1956] 1 All E.R. 14.

[3] [1898] 1 Q.B. 355, 357, 359–360, 374 (C.A.); 14 T.L.R. 92; [1899] A.C. 198, 201–202, 205, 208, 211, 217, 218–219 (H.L.).

[4] [1900] 1 Q.B. 442; 16 T.L.R. 60.

It enumerates the items which are to be deemed to be property passing on the death, whether or not they actually pass, according to the ordinary sense of the words. In *Attorney-General* v. *Milne* [5] what Lord Dunedin and Lord Parker said supports the view which the appellant now submits. When one finds property which actually changes hands under section 1 alone, it is only in exceptional circumstances that it would be important to decide whether or not it is also in a section 2 category. *Nevill* v. *Inland Revenue Commissioners* [6] is a long way from the present case. *Sanderson's* case [7] is directly in point. Lord Radcliffe there gives the true relationship of sections 1 and 2, and the appellant here adopts his statement. As to "deeming" provisions, see *St. Aubyn* v. *Attorney-General.*[8]

The line of cases represented by *In re Duke of Norfolk* [9] deals with continuing annuities where the testator directed an annuity to be paid to two persons in succession; the right to receive the annuity has been held itself to constitute an item of property. If one has an item of property which actually passes, one must charge that and not an item of property which is merely deemed to pass. In that case it was argued for the Crown that duty might be claimed under section 2 (1) (*b*) in respect of the passing of an annuity although it also passes under section 1. That is an example of how the Crown itself has in the past treated Lord Macnaghten's observation as a mere dictum. See also *In re Cassel,*[10] *In re Tapp,*[11] *De Trafford* v. *Attorney-General* [12] and *In re Lambton's Marriage Settlement.*[13]

The provisions excluding property from the charge to duty under section 1, formerly contained in section 2 (2) of the Act and still contained in section 2 (3), remove from the ambit of section 1 certain classes of property passing under section 1. Similarly, the excluding provisions of section 2 (1) (*b*) remove from the ambit of section 1 all property in which the deceased only had an interest as the holder of an office. If the right to live in a particular house is attached to an office, there is no reason why the exception should not apply to it just as much as to the payment of an annual sum from a trust fund. It would be strange if a fund charged with an annuity enjoyed by the holder of an office were exempted but not an item of property, such as a house, which he enjoyed in the same capacity, or a fund the whole income of which was payable to him. There would be a corresponding anomaly in the case of property in which the interest of the deceased was only as a corporation sole. On the Crown's submissions an annuity payable to the incumbent of a parish would be exempt, but not the parsonage house or the glebe land.

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[5] [1914] A.C. 765, 768–769, 773, 774, 779 (H.L.); 30 T.L.R. 476.

[6] [1924] A.C. 385, 389 (H.L.); 40 T.L.R. 341.

[7] [1956] A.C. 491.

[8] [1952] A.C. 15, 37–38, 53, 59 (H.L.); [1951] 2 All E.R. 473.

[9] [1950] Ch. 467, 472–474, 484–486 (C.A.); 66 T.L.R. (Pt. 1) 695; [1950] 2 All E.R. 851.

[10] [1927] 2 Ch. 275, 279; 43 T.L.R. 743.

[11] [1959] Ch. 443, 457 (C.A.); [1959] 2 W.L.R. 541; [1959] 1 All E.R. 705.

[12] [1935] A.C. 280, 288 (H.L.); 51 T.L.R. 298.

[13] [1952] Ch. 752; [1952] 2 T.L.R. 68; [1952] 2 All E.R. 201.

The interest of Mr. Arnholz here was only as the holder of an office. Trusteeship is an office. The requirement in section 2 (1) (*b*) that the interest of the deceased should be " only an " interest as holder of an office " is satisfied where not only is the income of the fund payable to him so long as he holds the office but also where it is remuneration for his services in the office. If an annuity of £100 a year is payable to trustees as remuneration for their services as such, the trustees are entitled to it only as holders of the office. If a company makes a seven years' service agreement with its managing director for payment of £5,000 a year to him, he is only entitled to it as holder of an office: see *Attorney-General* v. *Eyres* [14] and *Dale* v. *Inland Revenue Commissioners*.[15]

The House of Lords is not bound by authority to decide against the appellant.

E. B. Stamp (*Sir Lynn Ungoed-Thomas Q.C.* with him) for the respondents. The exception in section 2 (1) (*b*) of the Act of 1894 on which the appellant relies applies only to that paragraph and not to property which passes on the death within the meaning of section 1. The terms of the bequest to Mr. Arnholz did not mean that the trust fund in which he enjoyed the interest was property in which he had " an interest ceasing on [his] " death " within section 2 (1) (*b*), and so the exception cannot apply to his case.

It is admitted that in *In re Duke of Norfolk* [16] the Crown tried to resort to section 2 (1) (*b*) to modify section 1, but that contention was rejected.

It is both on construction and authority that it is submitted that the words of exception in section 2 (1) (*b*) only limit the effect of that paragraph. It was part of the ratio decidendi in *Cowley's* case [17] that if a case is covered by the words of section 1, then section 2 (1) does not apply at all and one is not concerned with it. That was the effect of that decision as understood in *De Trafford's* case.[18] The view of the sections now submitted has been accepted by the House of Lords in several cases and it is too late now to disturb those decisions.

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[14] [1909] 1 K.B. 723, 735; 25 T.L.R. 298.

[15] [1954] A.C. 11, 26 (H.L.); [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671.

[16] [1950] Ch. 467.

The effect of section 2 (1) is to bring into charge property which if section 1 had stood alone would not have been charged. There is plenty of room in section 2 (1) (*b*) for the words of exclusion to operate on the property brought into charge by the subsection, without resort to section 1. The ordinary case where a person is entitled to an annuity by way of remuneration as the holder of an office comes within its operation. The right to an annuity is personal to the recipient and only the individual has a right to it. So, in the case of an annuity given to a trustee, on the appointment of a new trustee a new annuity starts. No one could say that on the death of the first holder of the office the new trustee has become entitled to the old trustee's remuneration. Therefore the case would not be covered by the words of section 1, " property . . . which passes on the death of " such person." *In re Duke of Norfolk* [19] only applies where the direction to the trustees is to pay £*x* a year to A and after his death to B.

In the case of a corporation sole the holder has an interest in the property vested in it but does not own it. The corporation sole continues to exist and on the death of the holder the property remains vested in it. The conception of the corporation sole which never dies is metaphysical. The case of a bank manager enjoying the use of a house owned by the bank is quite a different matter.

In what Lord Macnaghten said, he meant that there is a dichotomy in the effect of section 1 and section 2, not in their wording. A reason given by a judge for his decision is not to be regarded as obiter just because he has given another reason as well: see *Jacobs* v. *London County Council.*[20] In *Cowley's* case [21] the ratio decidendi was simply that if a case falls within section 1 without the aid of section 2 (1), one is not concerned with section 2 (1). *Attorney-General* v. *Beech*[22] does not carry the matter further, but *De Trafford* v. *Attorney-General*[23] does. In that case it was part of the ratio decidendi that the matter did not fall within section 2 (1) (*b*), which, accordingly, could not be considered. To find in favour of the appellant would involve overruling *In re Duke of Norfolk*[24] and also *Lambton's* case.[25] In both *Adamson* v. *Attorney-General*[26] and *Attorney-General* v. *Lloyds Bank Ltd.*[27] the House of Lords approached the matter on the footing that sections 1 and 2 are in separate compartments. One need not trouble with *Burrell* v. *Attorney-General.*[28]

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[17] [1899] A.C. 198.

[18] [1935] A.C. 280.

[19] [1950] Ch. 467.

[20] [1950] A.C. 361, 368–369 (H.L.); 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737.

[21] [1898] 1 Q.B. 355, 364–365, 367–368, 379–380, 381; [1899] A.C. 198, 207, 208, 210–211, 216–217, 219.

Even if the exception in section 2 (1) (*b*) does operate on section 1, it does not apply to the appellant, because the interest which the deceased had in the property was not " only an interest " as the holder of an office." The interest was given to the deceased as an individual while he was living and held the office of trustee; it was not attached to the office of trustee. It is conceded that if a testator provides that the trustee or trustees for the time being of his will shall be entitled by way of remuneration to £200 a year, the interest which each trustee has is an interest as the holder of an office. In Blackstone's Commentaries (1766 ed.), Book II, ch. 5, p. 56, offices are defined as " a right " to exercise a public or private employment, and the fees and " emoluments thereunto belonging are also incorporeal heredita- " ments." The exception in section 2 (1) (*b*) only applies where fees are attached to the office. A gift of £100 a year to the headmaster for the time being of a school would be a gift to which each headmaster would become entitled as a holder of the office. But in the case of a gift to Mr. Jones so long as he is headmaster of the school, he would not be entitled to it as the holder of an office. If there had been a gift here of £500 a year to the trustees for the time being of this my will and an extra £50 a year to B, so long as he acts as trustee, that would illustrate the difference.

John Pennycuick Q.C. in reply. The present question is as to the content of paragraphs (*a*) and (*b*) of section 2 (1). Authority does not preclude the House of Lords from giving the words their natural meaning. What Lord Macnaghten said in *Cowley's* case[29] in relation to sections 1 and 2 was a mere dictum. Neither in that case nor in *In re Duke of Norfolk*[30] was the House of Lords in the one case, or the Court of Appeal in the other, obliged, in order to arrive at their conclusion, to hold that sections 1 and 2 were mutually exclusive. In each of those cases the decision would have been the same if the tribunal had started with the construction of sections 1 and 2 which the appellant submits is correct. There is "no room for . . . a deeming provision when "that which is to be deemed has effectively taken place without "it": *St. Aubyn* v. *Attorney-General*.[31] If necessary, the appellant would submit that *In re Duke of Norfolk*[32] was wrongly decided, but it is not necessary. *Christie* v. *Lord Advocate*[33] throws no light on the relation of sections 1 and 2 in the connection with which we are here concerned. Nor does the decision in *De Trafford* v. *Attorney-General*[34] or that in the *Lambton* case.[35] To find in favour of the appellant it is not necessary to overrule any other case or to interfere with long-established principles.

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[22] [1899] A.C. 53; 15 T.L.R. 85.

[23] [1935] A.C. 280, 285–286.

[24] [1950] Ch. 467, 473, 481, 486.

[25] [1952] Ch. 752.

[26] [1933] A.C. 257, 267, 273, 277, 278; 49 T.L.R. 169.

[27] [1935] A.C. 382.

[28] [1937] A.C. 286; [1936] 3 All E.R. 758.

Within the plain meaning of the words the interest of Mr. Arnholz was only as the holder of an office. The word "office" has a wide meaning. Two executors administering a simple estate hold an office and, if they are remunerated, it is only as holders of an office.

Their Lordships took time for consideration.

Dec. 14. VISCOUNT SIMONDS. My Lords, at the date of his death on August 31, 1955, the late Henry Preuss Arnholz was, in the events that had happened, entitled to a fractional share amounting to 3/49½ of the income of the residuary estate of the late Lord Northcliffe. This income he enjoyed under a bequest in Lord Northcliffe's will to him "during his life so long as he shall "act as executor and trustee of this my will by way of remunera-"tion for so doing." Upon his death a claim was made against the Public Trustee as his executor for estate duty on a share of Lord Northcliffe's residuary estate corresponding to the share of income to which he was entitled. The Public Trustee resisted the claim on the ground that the interest of the deceased was only an interest as holder of an office and was therefore exempted from estate duty. This plea having been rejected by the Commissioners of Inland Revenue, he took out an originating summons in the Chancery Division of the High Court of Justice to have the question of liability determined. It was determined adversely to him by Danckwerts J. and by the Court of Appeal. Hence this appeal to your Lordships, and I will say now that it is at once as simple and as difficult a question as any that I have had to decide in the long years that I have been privileged to sit in this House.

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[29] [1899] A.C. 198.
[30] [1950] Ch. 467.
[31] [1952] A.C. 15, 37–38.
[32] [1950] Ch. 467.
[33] 1935 S.C. 169, 179–180, 186; [1936] A.C. 569 (H.L.); [1936] 1 All E.R. 443.
[34] [1935] A.C. 280.
[35] [1952] Ch. 752.

Let me first, my Lords, set out the material parts of the sections of the Finance Act, 1894, by which for the first time the duty called " estate duty " was imposed.

Section 1, which imposed the charge, provided as follows: " In the case of every person dying after the commencement of " this Part of this Act, there shall, save as hereinafter expressly " provided, be levied and paid, upon the principal value ascer-" tained as hereinafter provided of all property, real or personal, " settled or not settled, which passes on the death of such person " a duty, called ' estate duty,' at the graduated rates hereinafter " mentioned, and the existing duties mentioned in Schedule I to " this Act shall not be levied in respect of property chargeable " with such estate duty." I pause to observe that the word " passes," familiar as it has now become to us, was not in 1894 a term of art in the law relating to death duties, and that it would appear to have been a matter of sheer necessity for the Act to proceed to a definition of the area of charge. It was natural that the draftsman should do so by the use of the word " deem," a word which, as my noble and learned friend, Lord Radcliffe, has said in another case,[36] is apt to include the obvious, the uncertain and the impossible.

So it is that section 2 opens with the words in subsection (1): " Property passing on the death of the deceased shall be deemed " to include the property following, that is to say: . . ." Then follow categories of property, some of which must upon any fair meaning of the word " pass " be considered to pass upon the death of the deceased, as to others of which there might be uncertainty and as to others there would be no doubt that but for the deeming they would not pass. Then, appropriately enough, there follow subsections (2) and (3), of which subsection (2) deals with property situate out of the United Kingdom, including some part and excluding other part of such property from " property

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[36] *St. Aubyn* v. *Attorney-General* [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

"passing on the death of the deceased," and subsection (3) (having recourse once more to "deeming") provides that property passing on the death of the deceased shall not be deemed to include property held by him as trustee, and so on.

My Lords, if I were today looking at this Act for the first time, I should say that these sections were straightforward and clear, the first section imposing the charge in general terms and the second defining by inclusion and exclusion the precise area of that charge. I should unhesitatingly reject any suggestion that the two sections were in any way mutually exclusive or, as a corollary, that, if any property clearly "passed" on the death of the deceased under section 1, it was unnecessary to look at section 2. I should point to the first category of property which under section 2 (1) (*a*) is to be deemed to be included in property passing on the death, namely, "Property of which the deceased "was at the time of his death competent to dispose," and ask how this category which embraces the whole free estate of the deceased can be excluded from section 1, and, if it must (as it clearly must) pass under that section, what meaning can so far be given to section 2 (1) except that it is not purporting to bring into charge property which is not within section 1 but aims at defining all the various kinds of property which it is thought fit to charge. I should then look at section 2 (1) (*b*), and, bearing in mind that section 1 referred to property "settled "or not settled," and that section 2 (1) (*a*) had dealt with property that was not settled, I should expect to find that section 2 (1) (*b*) dealt with settled property. And that is what I should find. In language that is apt to cover all settled property and, in particular, the commonest form of settled property, namely, property in which a life interest is given with remainders over, the second main category of property is exhaustively defined. It would not occur to me that section 2 (1) (*b*) was intended to cover only property which did not pass (whatever that as yet undefined word might mean) under section 1. Moreover, if I had any doubt, it must have been dispelled by the words which are material to the present appeal; for the sub-paragraph proceeds to exclude from what is deemed to be included, property the interest in which of the deceased was "only an interest as "holder of an office, or recipient of the benefits of a charity, or "as a corporation sole." It would appear to be a wholly untenable view that these words of exclusion could refer not to a life interest but only to something less than a life interest. Strange as are the conclusions to which one is sometimes driven in the consideration of taxing statutes, I doubt whether in the whole realm of tax law a more fantastic result could be reached than to say that, if a person has a life interest in property as holder of an office, duty shall be leviable in respect of that property on his death, but that, if his interest is less than a life interest, then duty shall not be leviable. I should in fact find in the very words that I have cited the strongest argument against a construction of the statute for which the Crown has so far successfully contended.

I need say little about section 2 (1) (*c*) and (*d*). These subparagraphs bring the subject-matter within the area of charge which without a " deeming " clause would remain outside it. Nor need I say more about section 2 (2) and (3) than that in a section which comprehensively describes the area of charge I find, as I expect, a description of those categories of property and interest which are outside that area. Thus, my Lords, I come to the end of my examination of sections 1 and 2 with the clear conviction, which is not weakened but rather is confirmed by other sections, that section 2 is a categorical description of the property " settled " or not settled," upon which the new estate duty is imposed.

How is it, then, that in the present case Danckwerts J. and the Court of Appeal have come to a conclusion which rests upon a finding that the words of exclusion in section 2 (1) (*b*) have no relevance to a life interest enjoyed by a person as holder of an office? My Lords, they have been driven to this conclusion by those considerations which led me at the outset of this opinion to say that I have found this simple case so difficult to decide. They are founded upon expressions of opinion in this House primarily by Lord Macnaghten but in some degree by other learned Lords also. If in what I have already said I have impliedly criticised, and if in what I now say I venture to challenge, anything that Lord Macnaghten has said, I do so with the greatest diffidence. For I am well aware that to generations who have passed their lives in the law his is truly clarum et venerabile nomen. But his observations to which I must now refer have created so much doubt and difficulty that I have come to the conclusion, in which I understand that the majority of your Lordships concur, that the time has come to re-examine, not indeed, any decision of this House nor any reasoning that was strictly necessary to such a decision, but certain observations upon the interrelation of sections 1 and 2 which, as I humbly think, were made without full consideration of their consequences, and particularly of their bearing upon the words which are the special subject of this appeal.

My Lords, any discussion of this matter must begin with the case of *Earl Cowley* v. *Inland Revenue Commissioners.*[1] That case had a curious history. The facts were simple enough. A father and son (the second and third Earl Cowley) disentailed certain estates and, after mortgaging them to secure a large sum, resettled them so that a charge of an annuity was created in favour of the son and subject thereto the father enjoyed a life interest with remainders over. The father died and the question arose what estate duty was payable in respect of the settled estates; in particular could a deduction be made in respect of (a) the mortgage and (b) the son's annuity? It was decided by this House that the answer to (a) was " Yes " and to (b) " No." I may interpolate that it took more than 50 years to remedy by legislation the palpable injustice of the second answer. But, my Lords, the curiosity of the case was this. Until it reached this House the claim of the Revenue had been based on section 2 (1) (*b*). Were not the settled estates property in which the deceased father had an interest ceasing on his death? Neither in the Court of Appeal nor in the reported argument in this House nor in the formal case book, which I sent for and examined, was there any suggestion that the Revenue claim was based not on section 2 (1) (*b*) but upon section 1 to the exclusion of that section. Nine months passed, the case of *Attorney-General* v. *Beech*[2] having in the meantime been decided in this House, and then the judgment was given in which for the first time in the familiar words of Lord Macnaghten[3] the suggestion was made that " if the case falls within section 1 it cannot also come within " section 2. The two sections are mutually exclusive." It is undeniable that the learned Lord expanded on this theme. But to me it seems plain that his observation was per incuriam, and that when he said[3]: " Section 2 might with equal propriety be " headed, ' and with regard to property not passing on death,' " he had forgotten subsections (2) and (3) of section 2 and forgotten, too, the words of section 2 (1) (*a*) and the definition of those words in section 22 (2) (*a*). No other explanation of his speech has ever to my knowledge been offered until this hour.

My Lords, I do not get any assistance from *Beech's* case,[4] which, as I have said, was heard and determined while *Cowley's* case [5] was in gremio. But it is at least clear that the Revenue claim was based on section 2 (1) (*b*) (see bottom of p. 53) and that the mutual exclusiveness of sections 1 and 2 was not advanced on either side. I return to *Cowley's* case.[5] In the speech of Lord Morris there is at least an indication that the provisions of section 2 (1) (*b*) were uppermost in his mind. The speech of Lord Shand is neutral. In that of Lord Davey I find much that puzzles me. That learned Lord, having said that he agreed with Lord Macnaghten as to the construction of the Act, and that the case clearly fell within section 1, said [6]: "But, in my opinion, whether it falls within the first or the "second section we arrive at the same result," then briefly stated the effect of those sections and proceeded [7]: "The "only material words for the present purpose are in sub-"section (1) (*b*)," that is, of section 2, which he cited. Thus, my Lords, for him the only material words were in a section which Lord Macnaghten (with whom he agreed) had said should not be looked at. I have omitted to refer to the speeches which preceded that of Lord Macnaghten. In that of Lord Watson there is no support for Lord Macnaghten's construction. On the contrary, his reference to the fact that [8] "upon his father's death "no interest or benefit accrued to the appellant in respect of any "part of the equitable estates . . . " shows that he had section 2 (1) (*b*) in mind and determined the liability to duty by reference to that subsection. Lord Halsbury, on the other hand, appears to have taken the same view as Lord Macnaghten. I must cite his words [9]: "I see no ground for dealing with section 2, since, "for the reasons I have given, I think it is section 1 to which you "must look to see what property, real or personal, settled or "not settled, passed upon the death of the second to the third "Earl; but if I were compelled to give a construction to section 2 "(1) (*b*), I should come to the same conclusion in respect of the "liability to duty, since I think the benefit accruing or arising to "the third Earl was only to the extent of the value of the equity "of redemption. But, as I have said, the question must be "determined on section 1 alone."

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[1] [1899] A.C. 198; 15 T.L.R. 270.

[2] [1899] A.C. 53; 15 T.L.R. 85.

[3] [1899] A.C. 198, 212.

[4] [1899] A.C. 53.

My Lords, I will refer again to *Cowley's* case,[10] but now I pass on. Within a few months the case of *Attorney-General* v. *Dobree* [11] came before the court. Already the difficulty created

[5] [1899] A.C. 198.
[6] Ibid. 218–219.
[7] Ibid. 219.
[8] Ibid. 210.
[9] Ibid. 207.
[10] [1899] A.C. 198.
[11] [1900] 1 Q.B. 442; 16 T.L.R. 80.

by Lord Macnaghten's words had become obvious, and Channell J., a very learned judge, thus expressed himself [12]: " To my mind " there is a little difficulty in fully following the exact literal " words of Lord Macnaghten's judgment in *Earl Cowley* v. *Inland* " *Revenue Commissioners* [13] with respect to cases falling within " sections 1 and 2. It is quite true that if you can arrive at the " conclusion that the case falls within section 1, then section 2 " may be said to be excluded—you do not want section 2. But " one of the operations of section 2 seems to me clearly to be to " sweep into section 1 some cases which might be doubtful upon " the construction of section 1, but which section 2 includes in " clear words, and therefore brings them in to be subject to the " duty whether they were within section 1 on the true interpretation of it, or not. I think Lord Macnaghten must have meant " that in such cases, if you took the trouble to decide whether " they were within section 1 or not, and came to the conclusion " that they were, then you would not want section 2. At any " rate, it was not necessary for him in the case before him to " express an opinion contrary to what I have said." These observations were no doubt directed to the argument of Mr. Haldane Q.C.[14]: " The two sections are distinct and mutually " exclusive. If a case falls within section 2 it cannot fall within " section 1." I shall call in aid the last words that I have cited of the learned judge, which appear to me incontrovertible.

My Lords, I will now refer to two cases decided in this House, *Attorney-General* v. *Milne* [15] and *Nevill* v. *Inland Revenue Commissioners*.[16] In neither case was the validity of Lord Macnaghten's words in *Cowley's* case [17] necessary to the decision. I cite them to illustrate the surprising confusion that has grown up around them. In the first case Lord Haldane,[18] after referring to *Cowley's* case,[19] said: " Section 2 is thus not a definition section, " but an independent section operating outside the field of " section 1." In the latter case the same learned Lord said [20]: " ' Passes ' may be taken as meaning ' changes hands.' The " principle is contained in section 1. Section 2 combines definitions of such property with the extension of the application of " the principle laid down in section 1 to certain cases which are " not in reality cases of changing hands on death at all . . ."

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[12] [1900] 1 Q.B. 442, 450–451.

[13] [1899] A.C. 198.

[14] [1900] 1 Q.B. 442, 447.

[15] [1914] A.C. 765; 30 T.L.R. 476.

[16] [1924] A.C. 385; 40 T.L.R. 341.

[17] [1899] A.C. 198, 212.

[18] [1914] A.C. 765, 769.

[19] [1899] A.C. 198.

[20] [1924] A.C. 385, 389.

Lord Haldane, whose irreconcilable statements encourage a new look at the sections, was the only learned Lord to take part in both cases. I do not find that any other Lord who took part in *Nevill's* case [21] expressly or impliedly dissented from his view of the interrelation of the sections. It was otherwise in *Milne's* case.[22] In that case Lord Atkinson appears to have adopted Lord Haldane's earlier view, treating section 2 as merely supplementary to section 1, and as designed to make liable to estate duty certain dispositions of property which were outside the scope and beyond the reach of section 1. "This section," he said,[23] "is not a definition section." He did not, however, say (and this is significant) that the two sections were mutually exclusive. Section 2 may well not be a definition section in the sense that any property escapes the charge which is not included in it, though I have not for myself been able to think of any property which would not be so included. It does not follow that the same property may not be caught by the general words in section 1 (Lord Haldane's "principle" in *Nevill's* case [24]) and by the categorical description in section 2. It is, I think, possible to attribute this meaning also to Lord Parker's words [25]: "It is "in no sense a definition section." If so, I would agree with it, as, I think, did my noble and learned friend, Lord Radcliffe, in a case to which I will presently refer. Lord Dunedin took a different view. Having said that whether Lord Macnaghten was strictly correct or not in saying that whether the two sections were mutually exclusive or not seemed to him to matter little, he added [26]: "It seems to me that that is as much as to say that "the words, 'property passing on the death,' in the first section, "are to be read as if the words, 'including the property following, "'that is to say'—(and then all the subsections) had been there "inserted." My Lords, I find it difficult to see how Lord Dunedin's view could march with Lord Macnaghten's words. But perhaps his statement that it mattered little whether Lord Macnaghten was strictly correct or not meant that he thought he was clearly wrong.

The next case in this House upon which reliance was placed was *Adamson* v. *Attorney-General*.[27] But I think it unnecessary to pause over it, for it throws no light on the inter-relation of the two sections except to illustrate the confusion of mind which *Cowley's* case [28] has caused.

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[21] [1924] A.C. 385.
[22] [1914] A.C. 765.
[23] Ibid. 773.
[24] [1924] A.C. 385, 389.
[25] [1914] A.C. 765, 779.
[26] Ibid. 775.
[27] [1933] A.C. 257; 49 T.L.R. 169.

I come to *De Trafford* v. *Attorney-General.*[29] In that case the material question was the same as the second question in *Cowley's* case,[30] and the answer given was inevitably the same. It was unnecessary to consider the relation of the two sections, either of which would cover the case. Lord Russell of Killowen, in whose opinion the other noble and learned Lords concurred, adopted the words of Lord Watson in *Cowley's* case,[30] which, as I have already pointed out, do not rest on Lord Macnaghten's construction of the two sections. Finally, so far as decisions of this House are concerned, I must refer to *Sanderson* v. *Inland Revenue Commissioners.*[31] I do so only for the purpose of saying that I concur in what my noble and learned friend, Lord Radcliffe, said in that case, and welcome the opportunity now given to him to elucidate this "minor mystery of the "law."

My Lords, I have not thought it necessary to refer to the numerous cases in which *Cowley's* case [32] has been commented on in the Court of Appeal. It was natural and proper that that court should feel bound to follow not only the decision but the dicta of Lord Macnaghten in that case. But I will refer to *In re Cassel* [33] for a particular reason. That case illustrates in a special degree the importance of putting an end to the controversy about the meaning and scope of Lord Macnaghten's words. It will be remembered that *Cowley's* case [34] was a decision partly in favour of the Crown (though not on any ground urged by the Crown) and it has since that case been frequently contended that, if a case fall within section 1, section 2 must be disregarded. That is the whole of the argument in the case under appeal. Yet in *Cassel's* case [35] Russell J. said: "This indeed was the contention before "me of counsel for the Commissioners of Inland Revenue, who "definitely contended that in the ordinary case of property settled "on A for life with remainder to B estate duty was leviable on "A's death not under section 1 simpliciter but under section 1 "by virtue of section 2. In other words, such a case was a "section 2 case and not a section 1 case. . . ." It is true that Russell J. felt himself constrained by *Cowley's* case [36] to reject the contention which otherwise appealed to him. With great respect, I doubt whether his analysis of the speeches of all the Lords who took part in that case is correct, but my purpose in citing this case is to show into what confusion the law has been thrown when the Revenue authorities, whose duty it is to administer this difficult branch of the law, advance at one time an argument founded on Lord Macnaghten's dictum and at another an argument directly opposed to it. And, lest it should be said that *Cassel's* case [37] is, after all, ancient history, I will remind your Lordships that as recently as 1950 in *In re Duke of Norfolk* [38] it was argued by counsel for the Crown that the fact that duty can be claimed in respect of the passing of an annuity under section 1 does not preclude a claim for duty under section 2 (1) (*b*).

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[28] [1899] A.C. 198.

[29] [1935] A.C. 280; 51 T.L.R. 298.

[30] [1899] A.C. 198.

[31] [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14.

[32] [1899] A.C. 198.

[33] [1927] 2 Ch. 275; 43 T.L.R. 743.

[34] [1899] A.C. 198.

[35] [1927] 2 Ch. 275, 279.

[36] [1899] A.C. 198.

This brings me, my Lords, to a point directly apposite to the present appeal. The contention of the Crown, which has so far prevailed, is that the excluding words in section 2 (1) (*b*) have no application where property passes under section 1 and that, therefore, duty is payable in respect of property held by the holder of an office for his life, or presumably by a recipient of the benefits of a charity for his life or by a corporation sole (for example, a rector)—the last a somewhat difficult conception. Yet in the 65 years that have passed since the Finance Act, 1894, came into operation, such a claim has never before, so far as I or learned counsel are aware, been advanced by the Revenue authorities. In 1947 another trustee of Lord Northcliffe's will died. He, too, was entitled as trustee to a fractional share of the income of the residuary estate. Yet no claim was made for duty in respect of the proportionate share of capital. Why not? I do not find it easy to accept the suggestion that the omission was inadvertent.

What, then, my Lords, is the proper course to be taken? I believe that I yield to no one in the importance that I attach to the rule of precedent. But this case stands alone in my experience. Observations so patently wrong (may I be forgiven for saying so) that they leave only a sense of wonderment—unnecessary to the decision, for, as Lord Davey pointed out, the same result could be reached by another route—by Lord Davey himself accepted and dissented from in the same breath—flatly contradicted in 1924 by Lord Haldane who in 1914 had adopted them—the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of law—all these factors lead me to the conclusion that I can properly invite your Lordships to say that sections 1 and 2 are not mutually exclusive and that the excepting words in section 2 (1) (*b*) are operative in regard to property which falls within that subsection even though that property may fall also within the wide words of section 1. And I feel the less reluctance in doing so because these very words, had they been called to the attention of the House in *Cowley's* case,[39] might well have led to re-examination of the sections and to a different conclusion, and because I do not think that in any reported case the same conclusions could not have been reached if the construction of sections 1 and 2 which I submit had been adopted.

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[37] [1927] 2 Ch. 275.

[38] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 2 All E.R. 851.

A further point was taken on behalf of the Crown with which I can deal briefly. It is stated in the formal reasons of the respondents thus: "Because on the true construction of the "exception . . . it is limited in its application to interests attached "to an office and which the deceased had virtute officii and does "not extend to interests not attached to an office and which the "deceased merely enjoyed as an individual so long as he held a "particular office." If these words are intended to cut down the plain words of exception in the subsection, I see no justification for substituting them. The words of the statute and of the will are equally clear. Mr. Arnholz received a share of income during his life so long as he acted as executor and trustee of the will by way of remuneration for so doing. His trusteeship was an office and there is no reason for saying that his beneficial interest in the property was any other than in respect of that office. This is in accordance with the decision in *Attorney-General* v. *Eyres*,[40] the correctness of which has never, I think, been questioned.

In these circumstances, I am of opinion that the judgment of the Court of Appeal should be reversed, that the question asked by the originating summons should be answered in the negative and that the respondents should pay the appellant's costs here and in the courts below.

Lord Radcliffe. My Lords, I agree that the interest of the late Mr. Arnholz in the income of Lord Northcliffe's residuary estate was "only an interest as holder of an office" within the meaning of section 2 (1) (*b*) of the Finance Act, 1894. I do not think it necessary to add anything to what has been said on that point by my noble and learned friend, Viscount Simonds.

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[39] [1899] A.C. 198.

[40] [1909] 1 K.B. 723; 25 T.L.R. 298.

In saying that, however, I have begged the main question that was the subject of argument in your Lordships' House: for the case for the Commissioners of Inland Revenue was founded on the proposition that, though Mr. Arnholz's interest was conferred by the will as a right to " three equal one hundredth parts of the " said income . . . during his life so long as he shall act as " executor and trustee," this did not mean that the trust fund in which he enjoyed that interest was property in which he had an interest ceasing on his death such as is referred to in section 2 (1) (*b*) and that, accordingly, the exception from the class of property mentioned in that subsection of any property in which the deceased was interested only as holder of an office could not apply to his case. The proposition as thus stated by me is contorted. But then I think that the construction of sections 1 and 2 which the commissioners invite us to adopt is itself singularly contorted. That is not their fault. Their reading seems, at any rate at first sight, to have tradition behind it, even if the original pronouncement of Lord Macnaghten from which it is derived has been, I believe, much more often repeated than it has been understood. I can only say that at the end of the day I am relieved to find that we are not constrained by any authority to impose upon ourselves a construction of taxing provisions which seems to me as much contrary to the plain meaning of the Act as it would be frivolously capricious in its result.

If one were to undertake in 1959 the very difficult task of interpreting the scheme of the Finance Act, 1894, without knowledge of the two generations of judicial decision that have imparted to such words as " passing on death " exact shades of meaning that could not originally have been discerned, I believe that the general purport of the Act and the interrelation of its parts would still be tolerably clear. Settled estate duty apart, section 1 would be read as the section that imposed the charge of duty for all the purposes of the Act and it would be noted that the duty is granted upon " all property, real or personal, settled " or not settled, which passes on . . . death." It would be appreciated that the words " passing on death " had not at that time any precise significance in law; that they were not words of art or technical import; and that the conception of " estate duty " that was then being imposed was in many of its aspects radically different from the conceptions that had governed the familiar legacy and succession duties. Nor, since it was to be imposed on property settled as well as property not settled, did it present itself as another form of probate duty.

So approached, section 2 seems to be a natural sequel of section 1. Its purpose is to explain and refine upon the meaning of the words " property . . . which passes on . . . death " which section 1 had declared to be subject to the charge of duty. Subsection (1) therefore selects certain categories of property and, aided by the interpretation section, section 22, brings them expressly under the description of property passing on death, indifferent to the question whether, if it itself had not been part of the original scheme of the Finance Act, 1894, any one of those categories or any particular form of property falling within one of the categories would or would not have been treated by the courts as covered by the general words of section 1. I can see no significance one way or the other in the fact that it declares its purpose by saying that the categories selected shall be " deemed " to be included in the " property passing " which is charged by section 1. Such a phrase gives statutory certainty to what might otherwise be in some aspects uncertain and, in a few, impossible. Thus, subsection (1) (*a*) names a category, " Property of which the " deceased was . . . competent to dispose," which seems plainly to embrace all property which was within his absolute disposition at his death. Other uses of the same phrase in other sections of the Act show that there at least it is used in this general sense. Subsection (1) (*b*), consistently with this, names a category, " Property in which the deceased or any other person had an " interest, ceasing on the death of the deceased ": this seems the apt and natural expression to describe settled property in which the deceased had a life interest, settled property in which some other person had an interest terminable with the life of the deceased, and property in which there subsisted some interest for life, such as a life annuity, which did not carry the ownership of the whole income.

No doubt, much that is described in these two heads of section 2 (1) would have been charged in any event by force of the words used in section 1. In that sense it is permissible to say of section 2 (1), as has so often been said, that it " sweeps up " what is not covered by section 1. But that is to describe its effect or rather the effect that section 1 would have in the hypothetical situation of section 1 standing without section 2. It is not to describe its construction; and the distinction is important.

Having thus dealt with the two main heads of property the situation of which was such that it was to be regarded as passing on death, subsection (1) adds two other categories, of which it is enough to say that some cases that fall within them would anyway, most would certainly not without them, have been regarded as passing on death. Subsection (2), on the other hand, provided a rule for determining whether property situate outside the United Kingdom, assuming that it came within the description now established of what passed on death, should be subject to or exempt from duty. Subsection (3) deals with the special case of the passing of property on the death of a trustee holder. No one has ever questioned that the rules of inclusion or exemption contained in subsections (2) and (3) apply to all property within, or that would otherwise be within, the charge imposed by the terms of section 1.

I think that in the first years after the 1894 Act came into force its structure must have been generally understood to be as I have described it above. In particular section 2 (1) (*b*) was regarded as being applicable to the interest of a life tenant of settled property. No doubt, this era must now be looked back upon as some primitive golden age in the history of judicial dealings with the Estate Duty Act: but I cannot otherwise explain how it was that when *Earl Cowley's* case [41] came before the courts, it was throughout argued by counsel on both sides on the basis that it was the words of section 2 (1) (*b*) that provided the statutory rule for determining what property passed on the termination of a life interest in settled property such as was then in question. Neither side raised or argued any issue to the contrary. The real controversy in the *Cowley* case [41] was about something different, whether, a mortgage having been effected under a joint power of appointment created by tenant for life and remainderman on a resettlement, what was to be treated as passing on the life tenant's death was the equity of redemption, not the unincumbered fee. It was only when the House of Lords came to deliver their speeches upon that issue that there appeared for the first time in the speech of Lord Macnaghten this theory of the "mutual exclusiveness" of section 1 and section 2 which is solely responsible for the difficulty in the present case.

The purport of the *Cowley* decision [41] has been fully analysed in the speech which my noble and learned friend has just delivered. I do not want to take up time by repeating or enlarging upon it. All that I am concerned to state is what I think that authority amounts to for the purpose that we have now in

[41] [1899] 1 Q.B. 355; 14 T.L.R. 92; (H.L.) [1899] A.C. 198.

hand. I accept that nearly every member of the House who took part in the decision held that settled property in which a life interest terminated "passed under" section 1. That unfortunate phrase, however, means no more, indeed, could mean no more, than that such property would have been treated as charged with duty by virtue of section 1, even if section 1 had stood in the context of the Act without the accompaniment of section 2. And so, I expect, it would have been, since section 1 contains the words "settled or not settled," and the courts might from the first, unaided by section 2, have grasped that general conception of passing as being equivalent to changing hands in enjoyment which after two generations has become so natural to us. I confess that, since section 2 has from the first been as much part of the Act as section 1, I do not understand the value of this particular form of interpretation, which is a mere essay in hypothesis, unless one is to go further, as Lord Macnaghten himself did, and conclude that at no point does the property described by section 1 coincide with or overlap the various categories of property listed in section 2. This conclusion was not, I think, shared or laid down by any of the other members of the House who decided the case, nor did it appear to have any bearing on the outcome. On the contrary, they all seem to have thought that, though the property then in question "passed under" section 1, it did not matter whether it was section 1 or section 2 (1) (*b*) which provided the governing words, since in either case the practical result would be the same.

What the House did not decide is the question which we have here. That question can be set out as follows: If the words of section 2 (1) (*b*), "Property in which the deceased . . . had an "interest, ceasing on" his "death," are a fit and natural description of the property upon which duty is claimed, are the words of exemption found in that subsection, which relate to the holder of an office, a recipient of charitable benefit or a corporation sole, to be ignored, merely because the property would have been charged with duty by force of section 1, even if there had been no section 2 (1) at all? Now, if we were to treat Lord Macnaghten's own reading as if it had binding authority, I think that we should be compelled to answer that we must ignore them. For the construction that he adopted was that the categories of property which are spoken of in section 2 are only such "residual" items of property as would not have been charged by section 1 as passing on death if section 1 had stood by itself. From that it would seem necessarily to follow, if you allow that on Mr. Arnholz's death a share of the trust capital "passed" within the meaning of section 1 (see *In re Northcliffe*,[42] *Christie* v. *Lord Advocate*[43]), that the exemption attached to section 2 (1) (*b*) has no application to this capital share, since the exemption is attached exclusively to some species of property which section 1 does not touch.

In my opinion, Lord Macnaghten's construction is mistaken. I think that there is no foundation for it to be found in the words or scheme of the Finance Act, 1894, and it introduces into the interpretation of the Act a contorted and unnatural reading of section 2 (1) which, while normally of no practical effect, would produce in this particular case a consequence that I would regard as an absurdity. The words of section 2 (1) (*a*), "Property of "which the deceased was . . . competent to dispose," would shrink to signifying no more than the property over which a deceased person had possessed, but had not executed, a general power of appointment: the words of section 2 (1) (*b*), "Property "in which the deceased or any other person had an interest, "ceasing on the death of the deceased," would stand for no more than such property as had been subject to a terminable annuity. What meaning would be found for section 7 (7) (*a*) of the Act on this construction I have never yet been able to perceive, for it is clear that in that subsection it is assumed that the property described in section 2 (1) (*b*) may include property the deceased's interest in which extended to the whole income and which would therefore pass by virtue of section 1, even if it stood alone.

I speak of the consequence of this construction as an absurdity. I do not think those words are too strong. It would mean that the framers of this Act must be supposed to have intended to establish a scheme under which relief from duty was given where an office holder had been enjoying in respect of his office, say, an annuity for life charged on property, while no relief was to be available if the profit of the office had taken the form of the enjoyment of a house or land, the income of a trust fund or a perpetual annuity. Yet no ground of policy can be suggested for exempting the one class of property and taxing the others: and of all the typical cases of property which passes on the death of an office holder, recipient of charity, or corporation sole, the enjoyment of a residence stands, I should say, first.

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[42] [1929] 1 Ch. 327.

[43] [1936] A.C. 569; [1936] 1 All E.R. 443.

It is worth observing how various have been the explanations of section 2 which have been given in this House since the *Cowley* decision.[44] Perhaps the only common ground is that it is not a definition section: and that I follow, though I think that Rigby L.J.'s description of it as an "explanation" section[45] comes very near the truth. My citations are not exhaustive, but they include the following. In *Attorney-General* v. *Beech*[46] (a case which was heard after, but decided before, *Cowley*[47]) Lord Watson said: "It apparently was anticipated that a court of law "might place upon these words, 'which passes on the death of "'such person,' a construction limited to property which passed "in the ordinary sense of the term from the deceased into the "possession and property of another person after his death. But "the second section of the statute widens that interpretation "very much; for it extends it to all cases where a survivor of the "deceased takes a succession, or I should say rather, derives a "benefit by reason of the death of the deceased dependent "upon and emerging upon the death of the deceased." This is not only very different from, but it also conflicts with, Lord Macnaghten's dichotomy. Lord Haldane dealt with the function of section 2 on two separate occasions. In *Attorney-General* v. *Milne*[48] he said of it: "Section 2 is thus not a definition section, "but an independent section operating outside the field of "section 1." In 1924, on the other hand, in *Nevill* v. *Inland Revenue Commissioners*,[49] he laid it down: "'Passes' may be "taken as meaning 'changes hands.' The principle is contained "in section 1. Section 2 combines definitions of such property "with the extension of the application of the principle laid down "in section 1 to certain cases which are not in reality cases of "changing hands on death at all. . . ." While I think that his two explanations must be regarded as "mutually exclusive," to borrow Lord Macnaghten's phrase,[50] I find it much easier to relate the second to the actual form of the section. In the *Milne* case[51] Lord Dunedin expressed himself as follows about section 2: "It seems to me that that is as much as to say that the words, "'property passing on the death,' in the first section, are to be "read as if the words, 'including the property following, that is "'to say'—(and then all the subsections)—had been there "inserted." I do not see how the effect of the two sections could be put more succinctly, so far as section 2 (1) is concerned: but it is a very different reading from that of Lord Macnaghten. To complete my citations, Lord Parker said in the same case [52]: "The second section of the Act, by providing that property passing at the death shall be deemed to include certain kinds of "property which do not in fact pass at the death, artificially "enlarges the ambit of the expression 'property passing at the "'death.'" Any construction that is couched in such terms fails to explain why, for instance, "Property of which the "deceased was . . . competent to dispose" does not cover a great deal of property which does "in fact pass at the death."

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[44] [1899] A.C. 198.
[45] [1898] 1 Q.B. 355, 375–377.
[46] [1899] A.C. 53, 58, 59.
[47] [1899] A.C. 198.
[48] [1914] A.C. 765, 769.
[49] [1924] A.C. 385, 389.
[50] [1899] A.C. 198, 212.
[51] [1914] A.C. 765, 775.

There are two reflections which have pressed upon me in considering whether or not to favour this appeal. One is that, if we allow it, we find ourselves deciding that Lord Macnaghten's deliberate opinion as to the construction of the Finance Act, 1894, was on this point quite wrong. That is an unusual situation, for we are accustomed to regard with exceptional respect any pronouncement on law by that great judge. Moreover, one would expect him to have been peculiarly familiar with such a matter as the scheme and purport of this remarkable Act. I can only say that, just as it was his talent to see further beneath the surface of the law than most judges and to discern with clarity what, until he revealed it, had been unseen, so on a very few occasions he may have been led to perceive what was actually not there. I think that this must have been one of those rare occasions.

The second disturbing aspect of our decision is the possibility that it may invalidate the reasoning upon which a number of other decisions on estate duty have been founded. Lord Macnaghten's exposition of the interrelation of section 1 and section 2 contained the essential characteristics of a statement of legal principle: it was expressed in very precise language, and with a confidence that excluded the possibility of any alternative view. Indeed, it was not long before his words were taken to represent the *Cowley* decision itself, something which, as I see it, they were far from doing. They have become entwined with a great deal of judicial analysis of the estate duty scheme. In *In re Duke of Norfolk* [53] Lord Evershed M.R. referred to the "celebrated pronouncement" as "one of the most significant decisions on the "interpretation of the Finance Act, 1894." Even so, despite its fame, there seem to have been very few cases in which the application of Lord Macnaghten's formula has made any practical difference either in the incidence of duty or in the quantum of duty charged. In nearly every case it does not matter whether the property is regarded as passing "under" section 1 or "under" section 2, as "actually" passing or as "notionally" passing. That is because in the typical instance of settled property passing on the expiry of a life interest, the prescribed method of valuation is just the same whether you apply section 7 (5) or section 7 (7) (*a*). Certainly it was not part of the respondents' argument on this appeal that a decision in favour of the appellant would have a far-reaching consequential effect on established practice. It would not be fair to press this, for the consequences may take time to work out: but I find in it some support for my own view that the Macnaghten formula has been more of theoretical than practical importance.

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[52] [1914] A.C. 765, 779.

[53] [1950] Ch. 467, 473.

I have been able to detect for myself only one line of cases in which this particular method of construction has been the determining agent of the judgment arrived at. These are the cases of terminable annuities settled for successive life interests. It is obvious, for instance, that in *In re Cassel* [54] Lord Russell of Killowen (then Russell J.) would not have decided, contrary to his own judgment and to the argument of Mr. J. H. Stamp for the Revenue, that there was a passing "under" section 1 and, therefore, a valuation according to section 7 (5), if he had not thought himself compelled by Lord Macnaghten's words in *Cowley* [55] to reject a passing "under" section 2 (1) (*b*) and a valuation according to section 7 (7) (*b*). Similarly, the foundation of the Court of Appeal's judgment in *In re Duke of Norfolk* [56] is the Macnaghten formula. It would be wrong on this occasion to say anything more about those cases; it may or may not be necessary on another occasion to find out whether they would have been decided differently even if Lord Macnaghten had never spoken and to what extent in such cases a valuation according to section 7 (7) (*b*) would produce any result materially different from a valuation according to section 7 (5). Here it is necessary only to note their existence; and to observe with relief that, apart from them, there does not seem to be any line of cases the issue of which would be changed by a refusal to apply Lord Macnaghten's formula for the future.

I would allow the appeal.

[54] [1927] 2 Ch. 275.

[55] [1899] A.C. 198, 212.

[56] [1950] Ch. 467.

LORD COHEN. My Lords, under the will of the late Viscount Northcliffe, the late Henry Preuss Arnholz (to whom I shall hereafter refer as "Mr. Arnholz") was entitled immediately prior to his death to three of the 49½ shares of the income of the residuary estate of Lord Northcliffe. The interest in the income which Mr. Arnholz enjoyed was expressed by paragraph (26) of clause 6 of Lord Northcliffe's will to be given to him "during his "life so long as he shall act as executor and trustee of this my "will by way of remuneration for so doing."

The respondents claimed estate duty on the share of the capital of Lord Northcliffe's residuary estate corresponding to the share of the income thereof to which Mr. Arnholz was entitled immediately before his death on the footing that it had passed on the death of Mr. Arnholz within the meaning of section 1 of the Finance Act, 1894, but the appellant resisted this claim on the ground that liability to duty was avoided by the effect of the words in paragraph (*b*) of subsection (1) of section 2 of the said Act, which excludes property "the interest in which of the "deceased . . . was only an interest as holder of an office, or "recipient of the benefits of a charity, or as a corporation sole."

The respondents contended (1) that this exception has no application in relation to property which passes within the meaning of section 1, and (2) that in any event the interest of Mr. Arnholz in the income of the share of the capital which passed on Mr. Arnholz's death was given to him as an individual while he was living and held office as a trustee and was not attached to the office of trustee and was therefore not enjoyed by Mr. Arnholz as holder of an office within the meaning of the said paragraph (*b*).

Danckwerts J. rejected the respondents' second contention but upheld the first, as did the Court of Appeal. The Court of Appeal did not find it necessary to reach a conclusion on the second point.

My Lords, so far as the second point is concerned, I agree with Danckwerts J. that trusteeship of a will is an office within the meaning of section 2 (1) (*b*) and that Mr. Arnholz received his remuneration in the form of a share of the income of Lord Northcliffe's residuary estate only as holder of that office. I cannot usefully add anything to what has been said by the noble and learned Lord on the Woolsack on this branch of the case.

I turn, therefore, to the first point. Do the words of exclusion in section 2 (1) (*b*) apply to the present case, since it is admitted that the property in question would pass under section 1 even if section 2 (1) were omitted from the Act?

In approaching this question I have in mind the words of Viscount Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*,[57] where he said: "The golden rule is that the words of a "statute must prima facie be given their ordinary meaning." It was not, I think, disputed that, giving the words of the statute their ordinary meaning, the exclusion in section 2 (1) (*b*) would apply to the case now before your Lordships, but it was argued that your Lordships were precluded from so holding by reason of the decision of this House in *Earl Cowley* v. *Inland Revenue Commissioners*,[58] and in particular by the reasons given by Lord Macnaghten for his conclusion. The short facts of that case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estates so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under section 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. Thus there were two questions: First, was what passed the estate or was it only the equity of redemption? And, secondly, should a deduction be made from the value of the estate or the equity in respect of the annuity? In answering the first question Lord Macnaghten said[59]: "The "two sections are mutually exclusive. Section 1 might properly, "I think, be headed, 'With regard to property passing on death, "'be it enacted as follows.' Section 2 might with equal pro- "priety be headed, 'And with regard to property not passing on "'death, be it enacted as follows.' I cannot, therefore, agree "with Rigby L.J. when he says that section 2 is a provision "'explanatory' of section 1. In my opinion the two sections "are quite distinct, and section 2 throws no light on section 1. "But, then, no doubt section 2 speaks of 'property in which the "'deceased . . . had an interest ceasing on the death of the "'deceased.' And that, it may be said, was just the position "of the second earl with regard to the Mornington settled estates. "So it was. But section 2 does not apply to an interest in "property which passes on the death of the deceased. That is "already dealt with in the earlier section."

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[57] [1940] A.C. 1014, 1022; 56 T.L.R. 988; [1940] 3 All E.R. 549.

[58] [1899] A.C. 198.

[59] Ibid. 212–213.

If these observations are read without regard to what was the exact point before the House, they would be fatal to the appellant in the present case: but so read they would shut out the taxpayer not only from taking advantage of the excluding words in section 2 (1) (*b*) but also from the excluding provisions of subsections (2) and (3) of section 2. This can hardly have been Lord Macnaghten's intention. Indeed in *Attorney-General* v. *Dobree*,[60] where the court was considering the question of liability for duty under section 2 (1) (*d*) of an interest purchased or provided by a deceased, Channell J. referred to Lord Macnaghten's observations in *Cowley's* case [61] and suggested that some qualification seemed required on the apparently wide effect thereof. He said [62]: " It " is quite true that if you can arrive at the conclusion that the " case falls within section 1, then section 2 may be said to be " excluded—you do not want section 2. But one of the operations " of section 2 seems to me clearly to be to sweep into section 1 " some cases which might be doubtful upon the construction of " section 1, but which section 2 includes in clear words, and there" fore brings them in to be subject to the duty, whether they " were within section 1 on the true interpretation of it, or not. " I think that Lord Macnaghten must have meant that in such " cases, if you took the trouble to decide whether they were " within section 1 or not, and came to the conclusion that they " were, then you would not want section 2."

My Lords, I return to *Cowley's* case,[63] having in mind what was said by Jessel M.R. as to the use of authorities in *Hood* v. *Newby*.[64] He said: " You must always look to what was being " discussed by the judges as well as to the words used."

Now, applying the principle thus laid down by the Master of the Rolls, in *Cowley's* case [65] it is manifest that Lord Macnaghten had not in mind the excluding provisions of section 2, and in the case before your Lordships counsel for the respondents admitted that subsections (2) and (3) would apply to property passing under section 1. This admission was justified by what was said by Lord Parker of Waddington in *Attorney-General* v. *Milne* [66]: " It " [section 2] " also artificially limits such ambit " [the ambit of section 1] " by excluding certain kinds of property which do " in fact pass at the death." Counsel for the respondents argued, however, that the position was different as regards the excluding provision in section 2 (1) (*b*): this provision, he said, comes into the deeming provisions of section 1 and Lord Macnaghten's dictum must apply to the whole of subsection (1). My Lords, I am unable to agree. The material excluding provisions could equally have been expressed as a separate subsection thus: "Property passing on the death of the deceased shall not be "deemed to include property the interest in which of the deceased "or of some other person having an interest ceasing on the death "of the deceased was only an interest as holder of an office," etc. Had it been so expressed the provisions would plainly have been on a par with subsections (2) and (3), and I do not think the situation has been altered by the fact that as a matter of convenience and for the sake of brevity it is included in subsection (1) (*b*) of section 2. I prefer to conclude that Lord Macnaghten's mind was not directed to any of the excluding provisions in any part of subsection (2) and that had his attention been called to them he would have modified his observations so as to reserve that point.

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[60] [1900] 1 Q.B. 442.
[61] [1899] A.C. 198.
[62] [1900] 1 Q.B. 442, 450.
[63] [1899] A.C. 198.
[64] (1882) 21 Ch.D. 605, 608.
[65] [1899] A.C. 198.
[66] [1914] A.C. 765, 779.

In expressing this opinion I do not, of course, intend to question the decision in *Cowley's* case,[67] nor do I desire to challenge the validity of decisions, such as that in *In re Duke of Norfolk*,[68] which have been based thereon. But in so far as any of the observations of learned judges in such cases might appear to support the respondents in the case now before your Lordships, they are open to the same criticism as I have made on Lord Macnaghten's speech in *Cowley's* case,[69] namely, that they were not directed to any of the excluding provisions in section 2.

For the reasons I have given I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, for over sixty years Lord Macnaghten's judgment in *Cowley*[69] has, I should have said, been accepted as laying down a leading principle in the determination of estate duty cases. It has been repeatedly followed and made the ratio of subsequent decisions, and it must in very many cases which never reached the courts have been accepted as determining the liability to duty. As recently as 1950, in the case of *In re Duke of Norfolk*,[70] it was referred to by Lord Evershed M.R. as "the celebrated pronouncement of "Lord Macnaghten, which has constituted one of the most "significant decisions on the interpretation of the Finance Act,

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[67] [1899] A.C. 198.
[68] [1950] Ch. 467.
[69] [1899] A.C. 198.
[70] [1950] Ch. 467, 473.

"1894." In the same case Jenkins L.J. referred to Wynn-Parry J. in that case as having held himself bound, by the decision in *Cowley*[71] as applied by Russell J. in his judgment in *In re Cassel*,[72] to hold "that sections 1 and 2" [of the Finance Act, 1894] "are mutually exclusive and that the application of "section 1 accordingly precluded recourse to section 2, subsection "(1) (*b*)."[73] Jenkins L.J. proceeded: "In my judgment the "judge was clearly right in the conclusion to which he came, "and the principles by which he was guided in arriving at it are "no less binding on this court than they were upon him." These views are not, of course, binding on this House, but they evidence the general acceptance of an interpretation of the statute that plainly stems from Lord Macnaghten's pronouncement. And similar recognition of this view is not wanting in this House. It has been accepted by various of their Lordships in *Attorney-General* v. *Milne*,[74] *Adamson* v. *Attorney-General*,[75] *Attorney-General* v. *Lloyds Bank Ltd.*,[76] and *Christie* v. *Lord Advocate*,[77] in which case Lord Russell of Killowen had his earlier judgment in *In re Cassel*[78] before him. A somewhat ambiguous passage in the speech of Lord Haldane in *Nevill* v. *Inland Revenue Commissioners*,[79] a shadow of a doubt by Lord Dunedin in *Attorney-General* v. *Milne*[80] and the doubts expressed by my noble and learned friend, Lord Radcliffe, in the recent case of *Sanderson* v. *Inland Revenue Commissioners*[81] would seem to be the only expressions of opinion in this House indicating anything other than a complete acceptance of Lord Macnaghten's pronouncement. It is impossible to say what effect a departure from a practice based on this pronouncement may have on the future development of estate duty law, but it could be, I should think, not inconsiderable and may lead to the building up of a new body of estate duty decisions. In this situation I would examine afresh, but very briefly, the *Cowley* case.[82]

I would first observe that when Lord Macnaghten referred to section 2 of the 1894 Act he was clearly thinking of section 2 (1) of the Act. His observations could have no application to section 2 (2) or section 2 (3) of the Act, which brought in exceptions to the operation of section 1 and which had no relevance at all to the subject-matter under consideration by this House. Lord Macnaghten indeed has himself excluded these subsections, for, in referring to section 1, he said: "Subject to certain exceptions "or savings, it imposes a duty called estate duty upon the "principal value of all property 'settled or not settled' which "passes on death." The main exceptions or savings are to be found in sections 2 (2) and (3), 3, 15 and 21.

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[71] [1899] A.C. 198.
[72] [1927] 2 Ch. 275.
[73] [1950] Ch. 467, 484.
[74] [1914] A.C. 765.
[75] [1933] A.C. 257.
[76] [1935] A.C. 382.
[77] [1936] A.C. 569.
[78] [1927] 2 Ch. 275.
[79] [1924] A.C. 385.
[80] [1914] A.C. 765.
[81] [1956] A.C. 491.
[82] [1899] A.C. 198.

To turn, then, to section 2 (1), heads (*a*) and (*b*) of the subsection, taken literally and independently of any context, cover property that would come within section 1 of the Act as well as property that would not. But these heads must be read along with the opening words of section 2 (1): "Property passing "on the death of the deceased shall be deemed to include the "property following, that is to say," and then follow heads (*a*), (*b*), (*c*) and (*d*). On a well-known meaning of the word "deemed," much employed in legislation, this language may naturally be taken to mean: "The property following would not "be property which would be capable of being property passing "on death under section 1 but it is to be taken to be such "property." This may seem nonsense when one considers the language of subsections (1) (*a*) and (1) (*b*). But Lord Macnaghten cannot have failed to observe the terms of these subsections. It was, I think, their very obviousness that caused him to emphasise that they must not be read as including property that came under section 1. His reference to the view of Rigby L.J. alone shows that the matter was clearly before his mind. Property coming under section 2 is thus brought within section 1 and section 2 (1) has nothing to do with property which from its own nature passes on death without any need of a deeming provision. I do not say that initially this was the construction that need necessarily have been taken of the relationship of the two sections. Rigby L.J. in the *Cowley* case [83] took a different view, as did Channell J. a few months later in *Attorney-General* v. *Dobree*,[84] and the opinions expressed in the speeches delivered by your Lordships in the present case show that the opposite view was always open. What I have said is intended to epitomise in a few words what I understand to have been the train of reasoning in Lord Macnaghten's mind, as expressed much more fully in his speech delivered in the *Cowley* case.[85] I find it unnecessary to quote passages from a speech, already examined by your Lordships and so well known in the law, to elaborate the point. I am not convinced that what has been accepted as settled law should now be reversed and a new chapter of estate duty law entered upon afresh. It is not, I think, possible to say that each of the categories in section 2 (1) has not a content that would apply to cases that could not come under section 1 and which would be sufficient to explain the purpose of section 2 (1). And I cannot think that, if there had been no section 2, the courts would have had any difficulty in determining in the vast majority of cases what property passed on death, particularly having in view the definition in section 22 (1) (*l*). It would undoubtedly have been a more limited category than the legislature intended when it introduced section 2. But as section 1 includes property "settled "or not settled" and as on a cesser of life interests in settled property on death there has been held to be a passing of property under section 1, without any reference to section 2, it might reasonably be assumed that this result would have been reached if there had been no section 2 (1) in the statute at all.

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[83] [1898] 1 Q.B. 355.

[84] [1900] 1 Q.B. 442.

[85] [1899] A.C. 198.

My difficulties do not, however, end here. To turn to the facts of the present case, Mr. Arnholz enjoyed an aliquot share of the income of the residuary trust fund during his life so long as he should act as executor and trustee of the will and by way of remuneration for so doing. Had he enjoyed this income as an ordinary beneficiary of a life interest, estate duty would have been levied on his death as on a passing of property under section 1. But it is claimed that, as his enjoyment was that of a holder of office as trustee, the exemption in section 2 (1) (*b*) applies. Even if section 2 (1) (*b*) can be invoked, I feel some difficulty in thinking that the facts bring the case within the exemption. The excluding clause appears to me to point to property the interest in which pertained to the holder of an office, or recipient of charitable benefit, or a corporation sole, and fell to be enjoyed by a succession of such persons. In such cases it could not be said that there was any true passing of property on death, but there would be an interest in property within the meaning of subsection (1) (*b*). This would satisfy the limited meaning that Lord Macnaghten thought should be put on section 2 (1). I do not, however, fail to note that there may be hereditary and remunerative offices of which it may be said that there is a true passing of property under section 1. If so, I can see no reason why there should be any exemption from duty in the case of such

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property. This leads me to think that the exemption should be given a limited effect which does not apply to the facts of this case.

In the result I am of opinion, for the reasons which I have endeavoured to express, that the appeal should be dismissed.

Appeal allowed.

Solicitors: *Russell & Arnholz; Solicitor of Inland Revenue.*

F. C.

J. C.*
1960
March 9.

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA . . . . . APPELLANT;

AND

JOHN WHELAN BROWN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Criminal Law—Insanity—M'Naughten Rules—Irresistible impulse—Whether symptoms from which insanity can be inferred—Homicide.
Australia—Murder—Insanity—M'Naughten Rules—Irresistible impulse.
Criminal Law—Practice—Counsel—Reference to consequences of verdict by—Judge to direct jury of irrelevance.

Where the defence of insanity is raised in criminal proceedings the law will not recognise irresistible impulse—which per se affords no defence—as a symptom from which the jury may without evidence infer insanity within the M'Naughten Rules.

At the trial of the respondent on a charge of murder by shooting, in which the only defence was insanity, the medical evidence for the respondent was, inter alia, that he was a schizoid personality and that at the moment of shooting he knew the nature and quality of his act but did not know that what he was doing was wrong. In the course of his summing-up the trial judge had directed the jury that "uncontrollable impulse" was no defence in law. The respondent was found guilty and sentenced to death, and, his first appeal having been dismissed, he appealed further to the High Court of Australia, who quashed the conviction and ordered a new trial. In the course of their judgment the High Court stated: "To treat his "domination by an uncontrollable impulse as reason for a con- "clusion against his defence of insanity is quite erroneous. On

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

"the contrary it may afford strong ground for the inference that a "prisoner was labouring under such a defect of reason from disease "of the mind as not to know that he was doing what was wrong . . . "the fact that the subject was mentioned would make it necessary "to put before the jury the true operation of uncontrollable impulse "as a possible symptom of insanity of a required kind and "degree": —

Held, reversing the order of the High Court and restoring the verdict of the trial court, that the above view of the High Court did not accurately represent the criminal law. In no leading case of recent years where the defence of insanity was raised had there been any suggestion that although irresistible impulse afforded no defence per se the law would recognise it as a symptom from which the jury might without evidence infer insanity within the M'Naughten Rules (post, p. 451).

The words "true operation of uncontrollable impulse as a "possible symptom of insanity of a required kind and degree" in the above passage in the High Court's judgment implied, erroneously, that the law knew and recognised uncontrollable impulse as a symptom of legal insanity within the meaning of the M'Naughten Rules, and that it was the judge's duty to instruct the jury as a matter of law, and in the absence of any medical evidence, that it might afford a strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. That direction would, in effect, make a very considerable inroad into the M'Naughten Rules as hitherto interpreted.

Rex v. *Kopsch* (1925) 19 Cr.App.R. 50 and *Rex* v. *Rivett* (1950) 34 Cr.App.R. 87, C.C.A. considered.

Interlocutory observations of Greer J. in *Rex* v. *True* (1922) 16 Cr.App.R. 164, 167, C.C.A. disapproved.

Where, however, evidence had been given that irresistible impulse was a symptom of the particular disease of the mind from which a prisoner was said to be suffering, and as to its effect on his ability to know the nature and quality of his act or that his act was wrong, it would be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial (post, pp. 449–450).

Sodeman v. *The King* (1936) 55 C.L.R. 192, P.C. considered.

There was on the evidence ground for surmising that the respondent might have suffered from such abnormality of mind as might, under the recent amendment of the law in England (Homicide Act, 1957, s. 2 (1)), be held to diminish his responsibility (post, p. 459).

If counsel in murder trials are permitted in their addresses to juries to refer to the consequences of their verdict, it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine (post, p. 454).

Judgment and order of the High Court of Australia reversed.

J. C.

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ATTORNEY-GENERAL FOR SOUTH AUSTRALIA *v.* BROWN.

APPEAL (No. 49 of 1959) by special leave. On March 20, 1959, the respondent, John Whelan Brown, was found guilty of the murder of Neville Montgomery Lord on November 23, 1958, after a trial before Abbott J. and a jury in the Supreme Court of South Australia at Adelaide. He was sentenced to death. From that conviction he appealed to the Full Court of the Supreme Court of South Australia (Napier C.J., Mayo and Piper JJ.), who on April 15, 1959, dismissed his appeal. From that judgment the respondent appealed to the High Court of Australia (Sir Owen Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.), who on May 20, 1959, allowed his appeal, quashed the conviction and ordered a new trial. The Attorney-General for South Australia obtained special leave by Order in Council dated August 12 to appeal from that decision of the High Court.

The following summary of the facts relating to the killing of Lord, which were not in dispute, is taken from the judgment of the High Court: " Shortly before November 20, 1958, he [i.e., " the respondent] was engaged in Adelaide as a station hand for " Pine Valley, which is a sheep station about 65 miles north of " Morgan. Mr. Neville Montgomery Lord was a member of a " family to whom the station belonged and he had been the " manager of the station for some years. He was 32 years of age " and lived at the homestead with his wife and two young children. " There was a station cook, a woman whose room was adjacent " to but not part of the main building. The men station hands, " of whom there was only one other, lived in the men's quarters " perhaps 75 to 100 yards away. On the morning of Thursday, " November 20, 1958, Brown was picked up in Adelaide by a car " proceeding to Pine Valley and taken to his new job. He met " Mr. Lord on arrival at the station that afternoon. He was given " his room in the men's quarters and made the acquaintance of " the other station hand and the cook. The latter saw him at " meal-times during the next three days and he helped her with " the drying of dishes. Nothing occurred to excite comment. " Brown seemed quiet and well-behaved. Mr. Lord saw little of " him and all were sure that nothing had passed between them " that could excite any hostility in Brown to Mr. Lord. The " other station hand went off for the weekend. In his room there " stood visible from the door a .303 rifle and there were some " cartridges in the room with soft-nosed bullets for shooting " kangaroos. On Sunday night, November 23, Mr. Lord went to " bed about a quarter past nine. Mrs. Lord busied herself for a " little longer and went to the children's room between which and "the bedroom there was a communicating door. She was "attending to a child when, as she says, she heard the electric "light go on in the bedroom. Then there was a shot. She ran "through the communicating door and saw her husband lying on "the bed shot—shot through the head. She threw herself on the "bed. Brown came back through the passage door. She "screamed and he told her to be quiet, and after trying to quieten "her he ran out of the bedroom door into the hall or passage. "That led to the front door, about a yard distant, and also to the "back door. She described him as looking bewildered and "explained that she meant that she thought he might have been "taken aback that she had come from the next room, not knowing "there was a door between. She did not see him again. She "found the cook in her bedroom and they telephoned for help. A "doctor and a policeman arrived two or three hours later. Her "husband was dead. Brown had disappeared. A search for him "extended over the next four days. On the morning of Friday, "November 28, he came from some disused buildings some 25 "miles from the homestead of a station named Canegrass and "gave himself up. Canegrass homestead itself is 24 miles south "of Pine Valley homestead. As Brown gave himself up he asked: "'Is he dead?' He had carried the rifle for a time but had "abandoned it at a place about six miles from Pine Valley home-"stead. He answered the questions put to him by the police "then and thereafter without any apparent reservation. According "to his answers he had gone to bed in his quarters at about "half-past eight on the Sunday night. He remained awake "thinking and then got up and got the rifle from the room of "the other station hand and there tested the loading of the rifle "on the bed. He took the rifle and cartridges; the magazine "was full. He went across to the house, wearing socks but no "boots or shoes. The lights were on and through the window he "could see Mrs. Lord in another room. He walked in the front "door, went to the bedroom, put the rifle up, aimed it at Mr. "Lord and shot him. He was under the blanket and appeared, "so Brown thought, to be asleep. He said he went out of the "room to see where Mrs. Lord was. She went into the bedroom "and he then returned. He tried to quieten her and then ran "out the back way. He went to the cook's quarters to see where "she was. In answer to a question why he did so, Brown "answered: 'Because I thought that she might have rung up "'and given the alarm.' Her light was then on but he could not "see her through the window. He then returned to his quarters "and took his hat, the rifle, and a pair of boots from the other "station hand's room, and set off. He said that neither Mr. Lord "nor any other person there had given him any reason to bear "malice or had any argument with him."

The only defence was insanity.

1960. Jan. 25, 26, 27, 28. *T. G. Roche Q.C.*, *D. A. Grant* and *W. A. N. Wells* (South Australian Bar) for the appellant. The common law of England is to be applied in this case. At the trial the only defence was insanity; the general law of insanity is laid down in the M'Naughten Rules [1]—to establish the defence of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong: *Rex* v. *Kopsch.*[2] In reply to a police officer's question, "Did you know "at the time that it was wrong to point a loaded rifle at a person "and shoot?" the respondent answered, "Yes. But I could "not help myself." He said that he would not have done the same thing if a policeman had been there. It is common ground between both doctors that the respondent was a schizoid—an introvert—and the medical evidence for the defence was that when he committed the crime he was suffering from a temporary fit of schizophrenia which prevented him from knowing that his act was wrong. It was also common ground that this was a crime for which there was no proved motive. The question is whether the abnormality of mind prevented the respondent from knowing right from wrong; it is not suggested that it prevented him from knowing the nature and quality of his act. Uncontrollable impulse was never raised as a defence.

The High Court criticised the summing-up on, inter alia, the following grounds: (1) The judge ought not in the circumstances of this case to have directed the jury that irresistible impulse is no defence in law. (2) The converse of (1), he should have directed the jury that irresistible impulse was by itself strong grounds for inferring insanity in the legal sense. (3) There was misdirection as to the effect of the verdict. (4) The judge failed to put adequately the case for the accused.

As to the first of the High Court's criticisms (supra), there

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[1] (1843) 1 C. & K. 130.

[2] (1925) 19 Cr.App.R. 50, 51.

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was here no medical evidence of irresistible impulse. As a general proposition, irresistible impulse is no defence in law: *Rex* v. *Kopsch* [3]; that view is accepted in Australia: *Sodeman* v. *The King* [4]—the prisoner in that case applied to this Board for special leave to appeal, which was refused. The trial judge gave the jury a very clear direction that if the respondent did not know that what he was doing was wrong he was not guilty; and that uncontrollable impulse was no defence. Only the second branch of the M'Naughten Rules is in point here, and if the jury believed that the respondent knew that what he was doing was wrong, irresistible impulse cannot possibly be a defence in the law of insanity.

It is submitted on the second point (supra)—which is the converse of the same aspect of the case—that irresistible impulse is no ground for inferring insanity. Contrary to the view of the High Court, the trial judge did not err in the circumstances of this case in not directing the jury that irresistible impulse afforded strong grounds for inferring that the respondent was insane. It was said in *Rex* v. *Ronald True* [5] that " in the view of this court " there is no foundation for the suggestion that the rule derived " from *M'Naughten's* case has been in any sense relaxed," and there were no special features in the present case which made it appropriate for the judge to tell the jury, in the words of the High Court, " uncontrollable impulse . . . may afford strong ground " for the inference that a prisoner was labouring under such a " defect of reason from disease of the mind as not to know that " he was doing what was wrong." The only possible evidence of irresistible impulse was the respondent's own statement, " I " knew it was wrong, but I couldn't help myself." That evidence in itself shows that the irresistible impulse there referred to could not amount to insanity in the legal sense, for he himself said that he knew it was wrong. Further, there was no suggestion by either doctor that irresistible impulse, if it existed, was of a kind which prevented knowledge. It cannot be said that if there is irresistible impulse there is insanity; without evidence that is a non sequitur. This is a matter of great general importance because of the very fact of there being no evidence here; if the order of the High Court stands, it will be the duty of the judge in this case and in every case to tell the jury that irresistible impulse is strong ground for inferring insanity in the legal sense. That is clearly wrong.

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[3] 19 Cr.App.R. 50, 51.

[4] (1936) 55 C.L.R. 192.

[5] (1922) 16 Cr.App.R. 164, 170.

With regard to point (3) (supra)—the alleged misdirection as to the effect of the verdict—both counsel referred to the consequences of the verdict, but there was no misdirection, for it was the plain duty of the judge to direct the jury, as he did here, that they must not pay any regard to any of these matters; that is the invariable practice of judges in this country when anything is said as to the consequences one way or the other of their verdict.

Lastly, the adequacy of the summing-up must be judged by the background of the trial. [Reference was made to *Reg.* v. *Stokes*.[6]] There was here nothing that could possibly be called a misdirection. Reliance is placed in this connection on what was said by the Full Court of the Supreme Court of South Australia, who applied the rule in *Rex* v. *Immer and Davis*[7] where *Rex* v. *Dinnick*[8] was distinguished. There was and is no proper or sufficient ground for interfering with the respondent's conviction.

Wells following. The High Court in their judgment said: "The fact that the subject [of uncontrollable impulse] was "mentioned would make it necessary to put before the jury the "true operation of uncontrollable impulse as a possible symptom "of insanity of a required kind and degree." That can be taken to mean that the respondent's evidence that he knew it was wrong but that he could not help himself can of itself go before the jury as a complete defence. The High Court have gone a very long way in extending the M'Naughten Rules, and they have gone well beyond the original concept of disease of the mind. The very fact of murder involves inevitably abnormality of mind and irrationality of conduct: see the Homicide Act, 1957, s. 2 (1), and the observations of the Full Court as to there being ground for surmising that the respondent may have suffered from some such abnormality of mind as might, under the English Act of 1957, be held to diminish his responsibility.

L. J. Elliott (South Australian Bar) for the respondent. First, as to the High Court's criticism of the judge's failure to put the case for the accused; three undisputed facts were never put before the jury in a simple way they could understand: (i) that the shooting of the deceased was apparently a motiveless act; (ii) committed by a shy and non-aggressive character; and (iii) the medical evidence was not fairly or sufficiently put. As to the defence being put, see *Dinnick's* case[9]; the principle of that case has been applied continuously in the courts of England: *Reg.* v. *James Desmond Scott.*[10] The plain facts on which any defence is based have to be reiterated by the judge to the jury, however briefly. The principle of *Immer and Davis*[11] is that "A summing-up is sufficient if it is not unfair to the accused and if "points are not withheld which it is reasonable to suppose are "not already properly before the jury."

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[6] (1848) 3 C. & K. 185.

[7] (1917) 13 Cr.App.R. 22.

[8] (1909) 3 Cr.App.R. 77.

[9] Ibid.

Secondly, the High Court were amply justified in their criticism of the summing-up in relation to the observations as to the consequences of the verdict.

Thirdly, the trial judge was wrong in the circumstances of this case in directing the jury that if the accused acted under uncontrollable impulse that was no defence and he was guilty of the crime charged. That direction enables the jury to short-cut the problem that arose. The defence was insanity, and whether the jury thought that the respondent acted under uncontrollable impulse or not his actions had to be tested by the M'Naughten Rules. It is true that the judge gave proper directions as to insanity both before and after the direction as to uncontrollable impulse. There is no medical evidence of uncontrollable impulse; the only excuse for its introduction were the respondent's own words "I couldn't help myself." That is an inadequate basis for bringing in this suggestion of uncontrollable impulse; but the respondent's answer was perfectly consistent with the defence that he had a schizophrenic attack.

Uncontrollable impulse may or may not be some evidence, depending on the circumstances of every case, from which a jury can infer insanity. The High Court only said that it might be "a possible symptom of insanity." It may be taken into consideration with all the evidence. The principle of the High Court's judgment is that uncontrollable impulse does not rebut the defence of insanity: "but to treat his domination by an "uncontrollable impulse as reason for a conclusion against his "defence of insanity is," they said, "quite erroneous. On the "contrary, it may afford strong ground for the inference that a "prisoner was labouring under such a defect of reason from "disease of the mind as not to know that he was doing what "was wrong." Any abnormal behaviour may or may not form material from which a jury may or may not infer insanity. It was a misdirection, as the High Court found, in a case where the defence is insanity, for the judge to direct the jury that if in their view the only explanation of the death caused by the accused was that he acted under uncontrollable impulse it is their duty to bring in a verdict of guilty. The behaviour of an accused person, by whatever name it is described, is always material on which a jury can derive such assistance one way or the other for or against insanity in the legal sense as they see fit: *Rex* v. *Rivett*[12]; *Reg.* v. *Layton.*[13]

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[10] Unreported, April 30, 1959.

[11] 13 Cr.App.R. 22.

Finally, where the High Court of Australia has ordered a retrial for cogent reasons it would be setting a precedent of far-reaching importance for this Board to allow the appeal and deprive the accused of an opportunity of retrial.

Roche Q.C. in reply. On the merits there was no failure to put the case to the jury; the summing-up was perfectly proper. Immediately the Crown relied on the statement "I knew it was "wrong, but I couldn't help myself," it was inevitable that the judge should direct the jury that irresistible impulse by itself was no defence. The respondent's answer made it clear that there was knowledge. The passage in the High Court's judgment that "the fact that the subject [of uncontrollable impulse] was "mentioned would make it necessary to put before the jury the "true operation of uncontrollable impulse as a possible symptom "of insanity of a required kind and degree" raises a point of enormous importance not only in this case but in the whole administration of justice; and here it is the principal ground for ordering a new trial. If right, it would mean that in every case where the accused said "I could not help myself," the jury must be directed that they must regard it as a possible symptom of insanity of the required kind and degree. On the basis of the view of the High Court the defence must establish three things: (i) There is such a thing as irresistible impulse; (ii) it is a symptom of disease of the mind; and (iii) there was disease of the mind which produced this curious result, (a) irresistible impulse to kill, (b) did not prevent knowledge of the nature and quality of the act, (c) did prevent knowledge of wrongness of the act. The trial judge was right, for the following reasons, in not directing the jury on irresistible impulse in the terms stated by the High Court: (1) The only evidence of irresistible impulse was the respondent's statement to the police, and that in itself destroyed the insanity defence. (2) There is no medical evidence of the existence of any disease of the mind in which one gets the impulse to kill, a knowledge of the nature and quality of the act, but no knowledge of wrongness. (3) There is no evidence that if such a disease could exist the respondent was suffering from it. (4) It is not the duty of the judge to put to the jury a theory which the defence never suggested and which required evidence which has not been given.

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[12] (1950) 34 Cr.App.R. 87.

[13] (1849) 4 Cox C.C. 149.

March 9. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: The only real issue in the case was whether the defence had discharged the onus of proving on balance of probability that the respondent was legally insane when he shot Lord. This issue was further narrowed since the medical witnesses for the defence and for the prosecution agreed that the respondent was (1) what psychiatrists refer to as a schizoid personality, (2) that neither before nor after the shooting was the respondent suffering from any disease or disorder of the mind, and (3) that at the moment of shooting he knew the nature and quality of his act. Where they differed was that Dr. Forgan, for the defence, testified that in his opinion at the time of the shooting the respondent had lapsed into a temporary state of simple schizophrenia in which he did not know that what he was doing was wrong.

Dr. Shea, on the other hand, was of opinion that the respondent never at any time had schizophrenia, and that even if he did he not only knew the nature and quality of his act but also that it was wrong, as the respondent had told him when he examined him in prison.

Dr. Forgan's process of reasoning, shortly stated, appears from the following questions and answers in cross-examination: [His Lordship referred to the relevant evidence and continued:] Dr. Shea, on the other hand, was of opinion that there was no such thing as schizophrenia of five minutes' duration, which was roughly the period during which Dr. Forgan considered the attack in the present case must have lasted.

It will be convenient at this stage to set out certain questions and answers which appear in Exhibit "G," which is the statement of the respondent made to the police in the form of questions and answers. No objection to this statement being used in evidence on the ground of unfairness or for any other reason has been raised before any of the four tribunals before which this case has come. They are as follows:

I said: "You have told me that neither Mr. Lord nor any "other person had ever given you any reason to bear him any "malice."

He said: " Yes."

I said: " Is there any reason you wish to offer for your " conduct? "

He said: " Even though I do recall everything and I did it, I " don't think that I was responsible for my actions."

I said: " You knew that the rifle was loaded? "

He said: " Yes."

I said: " You knew that when you pulled the trigger it would " discharge a missile? "

He said: " Yes."

I said: " And that if the missile hit anyone it would at least " maim them and probably kill them? "

He said: " Yes."

I said: " Did you know at the time that it was wrong to point " a loaded rifle at a person and shoot at them? "

He said: " Yes. But I couldn't help myself."

I said: " Do you think that you would have pulled the trigger " of that rifle if there had been a policeman standing by you? "

He said: " No."

In order to follow their Lordships' opinion in this case appearing hereafter it is necessary to set out at some length certain passages in the summing-up of the trial judge, as well as the passages in the judgment of the High Court in which they are criticised. The passages in the summing-up are as follows: " On " the night of the shooting the accused says that he had gone to " bed early and that he got up and got the rifle and ammunition " just before he went into Mr. Lord's bedroom. The accused " himself owned no firearms and probably had he never seen the " rifle and ammunition in Dave's room he might never have " thought of shooting anybody. You will remember Mr. Elliott " drawing your attention to the fact that there was no motive " for this alleged crime. Gentlemen, throughout the centuries of " civilisation crimes have repeatedly been committed without any " apparent or discoverable motive. That is one of the reasons " why, in our childhood, we were taught never to put temptation " in anybody's way and what would be temptation for another " man, might be no temptation whatsoever to us. You may, " perhaps, remember the words of Shakespeare—' How oft the " ' sight of means to do ill deeds makes ill deeds done.' There, " standing before his eyes in Dave's empty room was the rifle and " ample ammunition and there were the means to do ill deeds. " Do you think that perhaps those means to do ill deeds made the " ill deeds done in this particular case? You may, perhaps, think

" that on November 23, the accused, when he shot Neville Lord " was acting on an uncontrollable impulse—a dreadful impulse " which arose suddenly and which he was unable to control. If " that view should commend itself to you, it is my duty to direct " you that that is no defence in law. The defence of uncon-" trollable impulse is unknown to our law, and if that, in your " considered view, is the only explanation of the death caused " by the accused on November 23, it is your duty to bring in a " verdict of guilty of murder. . . .

" You may, if you choose, when you go into the jury room, " take with you the statement of the accused signed by him as " John Stone. It comprises about seven pages of foolscap. You " will recall that he was asked by Detective Lenton whether he " knew anything about the shooting of Lord on the Sunday night " and he said, 'Yes'; and he was asked 'What do you know " 'about it?' and his reply was, 'I don't know how to put it,' " whereupon Lenton asked him a number of questions all of which " he seemed to answer perfectly sensibly and plainly. On page 2 " of the statement the accused describes very plainly what he did " when he shot Lord and how he followed Mrs. Lord into the " room when she was singing out, as he put it, and he then ran " out the back way. On page 4 he was asked, 'After you shot " 'Lord why did you go looking for Mrs. Lord?' and his reply " was 'Because I got scared,' and when asked what he meant " by that he said, 'I don't know.' He was asked whether when " he went to look for Mrs. Schiller the rifle was freshly loaded, " and he said that it was, and he was asked why he went looking " for Mrs. Schiller and the accused said, 'I just wanted to see " 'where she was,' and he was asked 'Why?' and his answer " was, 'Because I thought that she might have rung up and given " 'the alarm.'

" Well, gentlemen, you may ask yourselves why the accused " should think that anyone should be wanting to give an alarm " about him. Might I suggest to you that he then knew that what " he had done was wrong. He did not tell Detective Lenton " what he would have done, or whether he would have done any-" thing if he had found Mrs. Schiller, or found that she had given " an alarm by telephone. Perhaps, gentlemen, she may think now " that she was a fortunate woman that the accused did not find " her.

" On pages 5 and 6 of the signed statement, Exhibit 'G,' " Detective Lenton said, 'Is there any reason you wish to offer " 'for your conduct?' to which the accused replied, 'Even

" ' though I do recall everything and I did it, I don't think I was " ' responsible for my actions.' The detective said, ' You knew " ' that the rifle was loaded? ' He replied, ' Yes.' Lenton said, " ' You knew that when you pulled the trigger it would discharge " ' a missile? ' and he replied, ' Yes,' and Lenton then asked, " ' And that if the missile hit anyone it would at least maim them " ' and probably kill them? ' to which the answer was, ' Yes.' " The accused was then asked what you may think was a vital " question, in view of the course the defence has taken—' Did " ' you know at the time that it was wrong to point the loaded " ' rifle at a person and shoot at them? ' The answer you may " regard, if it so appeals to you, as the answer to the problem you " have to solve. The answer by the accused to that question, " ' Did you know it was wrong? ' was ' Yes, but I couldn't help it.'

" Now, gentlemen, if you accept the evidence in that statement Exhibit ' G,' it does not matter whether you think that " the accused during that pregnant five minutes on the night of " November 23 was or was not suffering from schizophrenia as " Dr. Forgan thinks, if he did know, as he told Detective Lenton " he did, that it was wrong to point the loaded rifle at a person " and shoot at them. If you accept Dr. Shea's evidence you may " have no doubt that the accused was not suffering from any " mental disease and did know that he was doing wrong. If you " will look at Exhibit ' G ' on page 6, you will see that after " saying ' Yes ' to that question, the accused went on to say ' But " ' I couldn't help myself. I knew it was wrong but I couldn't " ' help myself.' These words, gentlemen, may suggest to you " that the accused was thereby setting up the defence of ' uncontrollable impulse ' which you may think is the true explanation " of what he did. But, as you will remember, gentlemen, I have " directed you, if that be the true explanation of what the accused " did, that is no defence, and he is guilty in law of the crime " charged. You may not like, gentlemen, to convict a man of " murder who ' couldn't help himself,' but if you are satisfied " beyond reasonable doubt of the truth of that answer, that may " be your duty.

" Detective Lenton's next question was, ' Do you think that " ' you would have pulled the trigger of that rifle if there had been " ' a policeman standing by you? ' To that the accused answered, " ' No.' Now, if you accept that answer, you may infer if you " think proper that the reason the accused answered ' No ' is " because, again, he knew that pulling the trigger was wrong. . . .

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"Mr. Chamberlain points out that if you acquit him, gentle-"men, the accused may ultimately kill someone else. Well, "gentlemen, you are not to concern yourselves with the conse-"quences of your verdict, and if you are satisfied he was not "guilty of this crime because of temporary insanity, then the "future must take care of itself. Mr. Elliott tells you that if you "find him not guilty because of insanity, I must commit him to "gaol to await the Governor's pleasure. How long the Governor "may be prepared to detain a man whom no one will now say is "insane may be problematical, but again that is no concern of "yours. Even if you find him guilty, the Executive Council may "refuse to allow him to hang, but that again is no concern of "yours."

The passages in the High Court's judgment are the following: "After setting out the facts relating to this and recalling Brown's "statement that he had gone to bed on the Sunday night and "had then got up and taken the rifle, the charge to the jury "proceeded in a manner which we think very much open to "objection. It is desirable to set out the passage in full. 'The "'accused himself owned no firearms and, probably, had he "'never seen the rifle and ammunition in Dave's room he might "'never have thought of shooting anybody. You will remember "'Mr. Elliott' (who was counsel for Brown) 'drawing your "'attention to the fact that there was no motive for this alleged "'crime. Gentlemen, throughout the centuries of civilisation, "'crimes have repeatedly been committed without any apparent "'or discoverable motive. That is one of the reasons why, in "'our childhood, we were taught never to put temptation in "'anybody's way and what would be temptation for another "'man, might be no temptation whatsoever to us. You may, "'perhaps, remember the words of Shakespeare—"How oft the "'"sight of means to do ill deeds makes ill deeds done." There, "'standing before his eyes in Dave's empty room, was the rifle "'and ample ammunition and there were the means to do ill "'deeds. Do you think that perhaps those means to do ill deeds "'made the ill deeds done in this particular case? You may, "'perhaps, think that on November 23, the accused, when he "'shot Neville Lord, was acting on an uncontrollable impulse—a "'dreadful impulse which arose suddenly and which he was "'unable to control. If that view should commend itself to you, "'it is my duty to direct you that that is no defence in law. The "'defence of uncontrollable impulse is unknown to our law, and

" 'if that, in your considered view, is the only explanation of " 'the death caused by the accused on November 23, it is your " 'duty to bring in a verdict of guilty of murder.'

" At a later point in his charge to the jury the learned judge " returned to the answer that Brown had given to the question " of the police officer whether he knew at the time that it was " wrong to point a loaded rifle at a person and shoot him, namely, " the answer 'Yes. But I could not help myself.' His Honour " said, 'These words, gentlemen, may suggest to you that the " 'accused was thereby setting up the defence of " uncontrollable " ' " impulse " which you may think is the true explanation of " 'what he did. But, as you will remember, gentlemen, I have " 'directed you, if that be the true explanation of what the " 'accused did, that is no defence, and he is guilty in law of " 'the crime charged.'

" The objections to these passages which of course must be " taken together are, we think, very serious. The foundation of " the case in support of the plea of insanity was that Brown's " act in shooting Mr. Lord as he lay asleep lacked any motive " actuating a sane mind. Upon this the evidence was entirely " one way. Irresistible impulse as such had not been raised as a " defence and no one had suggested that it could amount to a " defence. The manner in which the first of the foregoing " passages discounted the importance or effect of the absence " of ascertainable motive put this cardinal matter, to say the " least of it, in a false light. It was not at all unlikely to produce " an adverse effect upon the jury with respect to that very " element in the case for Brown which if one were guided by the " evidence there was no reason to doubt. What follows immediately concerning temptation and the sight of the means to " do ill deeds might not carry any very clear meaning to the " jury but its tendency could hardly be anything but prejudicial. " For it might be taken by them as suggesting that the prisoner, " finding a weapon available, was prompted to use it to shoot " Mr. Lord, for a reason which existed but was not ascertainable. " Then the possibility is introduced of the jury thinking it was " uncontrollable impulse. The result is a direction about uncontrollable impulse, which, if understood literally, is clearly " erroneous in point of law. For it is a misdirection to say that " if the jury think that the true explanation of what the accused " did was that he acted under uncontrollable impulse, that is no " defence and he is guilty in law of the crime charged. It is a

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"misdirection the operation of which might be to exclude the "prisoner's defence and to determine the verdict. Whatever the "learned judge may have had in mind in using the word 'only' "when he first gave the direction about uncontrollable impulse "the second statement says in plain terms that because the "killing was done under uncontrollable impulse, if that were "the jury's opinion, therefore it amounted to murder and they "must convict the prisoner. It may be true enough that "although a prisoner has acted in the commission of the acts "with which he is charged under uncontrollable impulse a jury "may nevertheless think that he knew the nature and quality "of his act and that it was wrong and therefore convict him. But "to treat his domination by an uncontrollable impulse as reason "for a conclusion against his defence of insanity is quite "erroneous. *On the contrary it may afford strong ground for "the inference that a prisoner was labouring under such a defect "of reason from disease of the mind as not to know that he was "doing what was wrong. The law has nothing to say against "the view that mind is indivisible and that such a symptom of "derangement as action under uncontrollable impulse may be "inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. This was put succinctly by "Greer J., during the argument of the case of* Rex *v.* Ronald "True,[1] *in stating how in an earlier case he had directed the jury. "His Lordship said, 'What I really told the jury was that the "'definition of insanity in criminal cases was the one laid down "'by the judges in M'Naughten's Case,*[2] *but that men's minds "'were not divided into separate compartments, and that if a "'man's will power was destroyed by mental disease it might "'well be that the disease would so affect his mental powers as "'to destroy his power of knowing what he was doing, or of "'knowing that it was wrong. "Uncontrollable impulse" in "'this event would bring the case within the rule laid down "'in M'Naughten's Case.' For that reason, even if no more "had been said than that uncontrollable impulse does not amount "to a defence, the fact that the subject was mentioned would "make it necessary to put before the jury the true operation of "uncontrollable impulse as a possible symptom of insanity of a "required kind and degree. . . .*

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[1] (1922) 16 Cr.App.R. 164, 167, C.C.A.

[2] (1843) 1 C. & K. 130.

"It is not outside the province of a judge at a criminal trial "to put to the jury a view which he may take of a piece of "evidence or of facts. How far he should go must depend upon "circumstances. But if he does so and puts views adverse to "the prisoner it increases the importance of his putting clearly "and in its true light the case made for the prisoner, or for that "matter the case for him that fairly arises on the evidence, "however little validity in fact the judge may be inclined to "ascribe to it. It is difficult to resist the impression that the "position taken up by Dr. Forgan was not placed before the "jury by the summing-up in a way which could be understood "and appreciated. Perhaps that arose from the evident "difference between the view expressed by the learned judge "about the absence of known motive and the central significance "the witness placed upon the motiveless character of the act. "Doubtless it is true, as the learned judge pointed out, that the "jury might reject the views of the experts, but this possibility "leaves untouched the defect in the summing-up. Nor did the "rejection of the view that Brown had suffered from schizophrenia necessarily dispose altogether of the question whether "there had existed a disease or disorder of the mind which might "satisfy the prerequisite condition required by the formula. In "all the circumstances we think that the cumulative effect of "the positive objections to those passages in the charge which "we have discussed is such that the conviction ought not to be "allowed to stand."

It is the concluding lines of the penultimate paragraph, beginning with the words "on the contrary" now printed in italics, which in their Lordships' view give rise to questions of great importance and far-reaching consequences in the administration of the criminal law. They would naturally be read by the judge who presides over the new trial and by all judges in similar cases in States where the English common law prevails as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong.

The words "the true operation of uncontrollable impulse as a "possible symptom of insanity of a required kind and degree" must imply that the law knows and recognises uncontrollable impulse as a symptom of legal insanity within the meaning of the rule in *M'Naughten's* case [3] and, in conjunction with the language used at the beginning of the passage in question, that it is the judge's duty to instruct the jury that it may afford strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. Furthermore, this direction is required not only in a case where there may have been no medical evidence, but even in a case, such as the present, where the medical evidence for the defence was to the effect that the prisoner when he committed the act was suffering from a specific disease or disorder of the mind known as schizophrenia which, although not preventing him knowing the nature and quality of his act, did prevent him from knowing it was wrong, but of which it was never suggested that irresistible impulse was a symptom or that it played any part in helping the medical witness for the defence to arrive at his diagnosis. So much so that counsel for the respondent on the present appeal, far from relying on irresistible impulse, contended that the trial judge should never have mentioned the subject in his charge to the jury as it formed no part of the case for the defence.

Their Lordships can find no support for the view that this accurately represents the criminal law.

At various times in the past attempts have been made to temper the supposed harshness or unscientific nature of the M'Naughten Rules. These attempts were supported by the high authority of Sir James Fitzjames Stephen, but in the end the rules remain in full force and their harshness has in this country been to some extent alleviated by the recent legislative enactment affording the defence of diminished responsibility. While the High Court, of course, fully recognise the binding force of the M'Naughten Rules, their Lordships think that the directions which they have indicated as appropriate for use by trial judges would in effect make a very considerable inroad into those rules as hitherto interpreted. Moreover, unless the law is presumed to take cognisance of irresistible impulse as a symptom of legal insanity, whence does the judge derive his knowledge of these matters, it not being permissible for him to make use of what he may have learned from evidence given in other cases?

Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial.

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[3] 1 C. & K. 130.

Sodeman v. *The King*[4] is an Australian example of such a case. The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised and to the sufficiency of the trial judge's direction thereon, but in the course of the judgments references were made to "irresistible impulse" and its possible bearing on the defence raised by the medical evidence in that case to the effect that if a man has an obsession and if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing, and does not know whether it is right or wrong. (Vide the judgment of Latham C.J.[5]) The learned Chief Justice used these words[6]: "But, on the other hand, it "should be remembered that, as already stated, the law "recognises that mental disease manifested in, for example, "what is called 'uncontrollable impulse,' may also be manifested "in lack of knowledge, or incapacity to have knowledge, of the "nature and quality of an act or of its character as a wrong act. "Such an impulse may be evidence of this very lack or in-"capacity. *Indeed, that was the effect of the medical opinions* "*given in evidence in this case, and this aspect of the case was* "*definitely put to the jury by the judge.*"

This passage must be read in the light of the concluding sentence now italicised. So read, their Lordships would not question it. But if the word "recognises" in the first sentence is construed to mean that the words which follow are matters of law which must or may be accepted and acted upon by juries without evidence it would not in their Lordships' opinion be an accurate statement of the law. The word "recognises" would seem to have been used in contrast to the rejection of irresistible impulse per se and means no more than that the law will not refuse to listen to evidence to the effect stated whereas it will refuse to listen to evidence of irresistible impulse per se.

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[4] (1936) 55 C.L.R. 192; affirmed [1936] W.N. 190; [1936] 2 All E.R. 1138, P.C.

[5] 55 C.L.R. 192, 203.

[6] Ibid. 205.

The presumption that the law takes note of such matters without evidence is implicit in the language of the High Court's judgment in the present case. It is this that their Lordships with great respect feel unable to accept.

It may be observed in passing that in the case of *The King* v. *Porter*[7] the charge to the jury by Dixon J. (as he then was) in which he dealt with the workings of the human mind appears to have been based upon the medical evidence given in that case. (Vide page 189, line 18, and page 190, line 18, "the medical "evidence included explanations of the course of mental "conditions in human beings generally.")

This distinction between what the law presumes and what the law will listen to is of the first importance in the present case since counsel for respondent has disclaimed any reliance on irresistible impulse either per se or as an element in the particular kind of mental disease relied upon to support the defence that the respondent, although aware of the nature and quality of his act, did not know that it was wrong, and submitted that the trial judge should never have referred to it in his charge to the jury.

Their Lordships do not derive much assistance from the interlocutory observations of Greer J. during the argument in the case of *Rex* v. *True*.[8] He was speaking from recollection of his summing-up in a case which he had tried two years earlier and in which no medical evidence had been given. No reference was made to his observations by the other members of the court and no authority has been cited in which the Court of Criminal Appeal has given its approval to such a direction. In none of the leading cases in recent years such as *Rex* v. *Kopsch*[9] and *Rex* v. *Rivett*,[10] where the defence of insanity was raised has there been any suggestion that although irresistible impulse affords no defence per se the law will recognise it as a symptom from which the jury may without evidence infer insanity within the M'Naughten Rules. In the latter of these cases the defence of insanity was based on evidence almost identical with the medical evidence in the present case.[11] It may, perhaps, be observed in passing that if such matters were left to a jury without the assistance of medical evidence there would seem to be two possible views which a layman might take as to the

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[7] (1933) 55 C.L.R. 182.
[8] 16 Cr.App.R. 164, 167.
[9] (1925) 19 Cr.App.R. 50, C.C.A.
[10] (1950) 34 Cr.App.R. 87, C.C.A.
[11] Ibid. 92.

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relevance of irresistible impulse to the M'Naughten tests. Some might think that before an impulse becomes irresistible there must have been some attempt to resist it and that the attempted resistance might well be due to knowledge of the wrongness of the act to which the prisoner felt himself impelled. Others might think that the irresistible impulse might impair the reasoning power to such a degree that it would no longer be able to appreciate the wrongness of the act. Why should the law prescribe that one of these views must be presumed to be correct rather than the other without medical evidence as to which is to be preferred with reference to the particular form of mental disease or disorder from which a prisoner is said to have been suffering?

Their Lordships are not, of course, suggesting that legal insanity cannot be sufficiently proved without medical evidence. The previous and contemporaneous acts of the accused may often be preferred to medical theory. But where the whole case for the defence is based upon the accused having a particular form of mental disease such as schizophrenia, the nature and symptoms of which are known to psychiatrists but knowledge of which cannot be attributed to a jury, the law will not step in to instruct a jury in the absence of medical evidence as to the "true "operation of uncontrollable impulse as a possible symptom of "insanity of a required kind and degree."

In arriving at a conclusion different from that of the High Court on a matter of this kind their Lordships may, perhaps, derive some comfort from the fact that they have had the advantage of a very full and helpful argument from both sides on this aspect of the case whereas they are informed that this particular matter not having been raised by the defence either in the Full Court or the High Court but having been taken by the court in the course of argument in the High Court, counsel may not have developed their arguments quite so fully or had so much opportunity of considering the matter as they have now been afforded. Moreover, they could not of necessity address their minds to the language in which the High Court eventually expressed its considered judgment.

Their Lordships now turn to other matters, which, though no doubt of great importance in the present case, are not of such a nature that their Lordships would normally investigate on appeal from the High Court. As, however, the Board has seisin of the appeal and as they are relied upon by the respondent as alone sufficient to justify the High Court in quashing the verdict and judgment at the trial they must be dealt with. They are as follows: It was contended by counsel for the respondent: 1. That the judge should never have mentioned irresistible impulse at all. This criticism is not to be found in the judgment of the High Court and is, indeed, contrary to its tenor, but it was strongly pressed by counsel for the respondent. 2. That the judge's references to irresistible impulse were so worded that the jury would or might infer that even if they were satisfied that the respondent did not know that what he was doing was wrong they must nevertheless find him guilty of murder if they thought he was acting on an irresistible impulse. 3. That the judge misdirected the jury in his references to the absence of motive. 4. That there was misdirection in the judge's reference to the consequences of the jury's verdict. 5. That there was misdirection in the judge's reference to Mrs. Schiller. 6. That the case for the defence was not sufficiently or fairly placed before the jury.

Points 2 to 6 inclusive were relied upon by counsel before the Board and appear in the judgment of the High Court. Points 1, 2, 3 and 5 were not raised by counsel on the appeal to the Full Court of the Supreme Court of South Australia or on appeal to the High Court. Numbers 2, 3 and 5 emerged in the course of the High Court hearing and No. 1 appeared for the first time before the Board. Their Lordships are not for one moment suggesting that the High Court were not entitled and indeed bound to take and act upon these points if they considered they amounted to serious misdirections, but the result has been that neither the High Court nor the Board have had the advantage of the views and experience of the Full Court of South Australia on four out of six of the matters now complained of and which had apparently escaped the notice both of counsel, who had been astute to draw the judge's attention after the jury had retired to what he submitted were defects in his summing-up and to remedy one of which the judge had recalled the jury, and of all three members of the Full Court of South Australia.

It will be convenient to deal first with Nos. 4 and 5. There is no reason to suppose that the High Court would have considered these matters by themselves as justifying quashing the verdict and judgment of the trial court. It would seem probable that the High Court, being minded to order a new trial by reason of what they considered serious misdirections with regard to the law of insanity, referred to them in order that they should not be repeated at the trial. Their Lordships feel bound, however, to say that in their opinion the observations of the trial judge on these matters were not open to criticism. With regard to No. 4, the Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine. Their Lordships do not regard the language which the trial judge used on the present occasion as open to criticism. It was as follows: "Mr. Chamberlain points out that if you acquit him, gentlemen, "the accused may ultimately kill someone else. Well, gentlemen, you are not to concern yourself with the consequences of "your verdict, and if you are satisfied he was not guilty of this "crime because of temporary insanity, then the future must take "care of itself. Mr. Elliott tells you that if you find him not "guilty, because of insanity, I must commit him to gaol to await "the Governor's pleasure. How long the Governor may be "prepared to detain a man whom no one will now say is insane "may be problematical, but again that is no concern of yours. "Even if you find him guilty, the Executive Council may refuse "to allow him to hang, but that again is no concern of yours."

No. 5 concerns the judge's reference to Mrs. Schiller. The respondent in his statement to the police had said that after having shot Mr. Lord and after Mrs. Lord had gone into the bedroom where Mr. Lord was he (the respondent) had gone to see what the cook (i.e., Mrs. Schiller) was doing. He was asked "Why did you go looking for Mrs. Schiller?" He replied "I "just wanted to see where she was." He was asked "Why?" and replied "Because I thought she might have rung up and "given the alarm." In the written statement which he read from the dock he said: "On the Sunday evening when it "happened I seemed to be acting in a dream. I do not remember "why I chose Mr. Lord rather than Mrs. Lord or the lady cook." The judge's reference in his summing-up to the respondent's answers to the police on this matter have already been set out.

The conduct of the respondent immediately after the shooting was relevant to the state of his mind at the time of the shooting, and the observation with regard to Mrs. Schiller's good fortune would seem to have been fully justified on any view of the case having regard to the respondent's statement from the dock.

The more serious criticisms of the judge's summing-up, involved in Nos. 1, 2, 3 and 6 above, must now be dealt with. No. 1, viz., that the judge should never have referred at all to irresistible impulse, was, as already stated, a point taken by counsel for the respondent before the Board. It could not have been taken at an earlier stage, because the possible significance of irresistible impulse only emerged on reading the judgment of the High Court. Their Lordships do not consider it valid. It is true that it formed no part of the respondent's defence of insanity on the medical evidence adduced in support of this plea, nor was it relied upon by his counsel as having any relevance to his defence, but the respondent in his statement from the dock and in his answer "Yes, but I could not help myself" to the police officer's question "Did you know at the time it was wrong "to point a loaded rifle at a person and shoot at them?" fully justified the judge in explaining to the jury in appropriate language that the criminal law of South Australia does not recognise the defence of insanity on the ground of irresistible impulse.

This leads to question No. 2, viz., whether the language used by the judge was appropriate or whether, as the High Court thought, it might lead the jury to infer that even if satisfied that the respondent did not know that what he was doing was wrong they must find him guilty of murder if they thought he was acting under an irresistible impulse.

The passages in the summing-up dealing with this matter and the High Court's criticism thereof have already been set out in full and it is not necessary to repeat them. They must, of course, be considered in the context of the summing-up taken as a whole and the course which the trial had taken. The sole issue had been whether the respondent had discharged the onus which lay on the defence of satisfying the jury that on balance of probability at the time when he shot Mr. Lord he was labouring under a defect of reason, due to disease of the mind, by reason of which he did not know that what he was doing was wrong. The greater part of the evidence and the summing-up and, it may be supposed, almost the whole of counsel's addresses to the jury would have been quite irrelevant if the short answer to the case had been: "Well, he says he could not help it, and if so he is guilty of murder "whether he knew it was wrong or not." Their Lordships do not consider that the language used by the judge could have been so interpreted by a jury who had listened to the whole case and, in particular, to the summing-up, which occupies nine pages of the printed record, and in which, in no less than seven different passages, the judge in the clearest possible language correctly instructed the jury as to the issues they had to decide and the onus of proof. It will suffice to set out the first and last of these passages. The first is as follows: "If after careful consideration "of the evidence that has been put before you, you are satisfied "on the balance of probabilities that the accused was on "November 23 labouring under a defect of reason due to disease "of the mind by reason of which he either did not know the "nature and quality of his act in killing Neville Lord, or did not "know that that killing was wrong then, and then only, your "verdict should be not guilty on the ground of insanity." He then went on to explain that in the present case all the medical evidence was to the effect that the respondent knew the nature and quality of his act, and that the real issue was whether he knew that his act was wrong. His last reference to this matter is to be found in the final passage of his charge. It reads as follows: "You may find him not guilty on the ground that he was "insane at the time he shot the deceased, which would mean "that you are satisfied beyond reasonable doubt that he killed "Lord, but that at that time he was suffering from the mental "disease of schizophrenia and did not know that he was doing "wrong and that, therefore, he is not criminally responsible for "his acts. Finally, if not satisfied on the probabilities that he "was insane you may find him guilty of murder."

The passages complained of have so far been dealt with in their general setting, but even taken in isolation—though no doubt in the light of the criticism to which they have now been subjected they might have been better worded—their Lordships do not think that they would be interpreted by a jury in the way suggested. The statement in the judgment of the High Court that "whatever "the learned judge may have had in mind in using the word "'only' when he first gave the direction about uncontrollable "impulse the second statement says in plain terms that because "the killing was done under uncontrollable impulse, if that were "the jury's opinion, therefore it amounted to murder and they "must convict the prisoner," seems to their Lordships unjustified. The passage in the summing-up starting on page 65 of the record at line 13 and ending at line 44 has to be read as a whole, and shows that the judge was referring to the series of questions and answers in the respondent's statement to the police officer (Exhibit "G") and in particular to the question "Did you know "at the time that it was wrong to point a loaded rifle at a person "and shoot at them?" and the answer "Yes, but I could not "help myself." When the learned judge said: "These words, "gentlemen, may suggest to you that the accused was thereby "setting up the defence of uncontrollable impulse which you may "think is the true explanation of what he did. But as you will "remember, gentlemen, I have directed you if that be the true "explanation of what the accused did that is no defence and he "is guilty in law of the crime charged," the "true explanation" refers to the whole answer "Yes, [meaning, Yes, I knew it was "wrong] but I could not help myself," and is not confined to the words "I could not help myself." The respondent's answer, if accepted by the jury, in terms negatived the defence of insanity. Their Lordships are, accordingly, of opinion that these passages dealing with irresistible impulse read together did not amount to misdirection.

No. 3 deals with the direction with regard to the absence of motive. The passage complained of has been set out earlier in this judgment. It is true that what the judge said was more appropriate to a case where it is necessary to instruct a jury that it is not necessary for the prosecution to prove motive in order to establish a case of murder. There was no such need in the present case as the killing had been established beyond doubt, and it was common ground that the respondent had no conscious motive for his act. Nonetheless the reference to Shakespeare's words "How oft the sight of means to do ill deeds makes ill deeds "done" was not wholly inappropriate in the present case. The medical witness for the defence was asked the following questions in cross-examination and gave the following answers:

"Q.—I suppose any action such as shooting a man could be "traced to some sort of impulse or emotion?

"A.—Yes. All human action is the result of some cause. "Something led to the impulse in this man to shoot Mr. Lord.

"Q.—It's really traceable to his feelings of inferiority and "guilt associated with his masturbation which produced an outburst of violence?

"A.—Yes.

"Q.—And one of the predominant and conscious characteristics of the human mind is to justify oneself in one's own eyes?

"A.—Yes.

"Q.—There would be an element of 'playing big' in front of "himself in this instance wouldn't there? In such an instance as "this, an unmotivated crime of this sort, it is 'playing big stuff' "in his own eyes?

"A.—That could be.

"Q.—It could also be influenced by the sight of a happily "married attractive young couple in contrast with his own view of "his own inadequacy?

"A.—That is the thing."

In the light of this evidence it would seem highly probable that the sight of the rifle and cartridge might have lit up these subconscious motives. However this may be, the absence of conscious motive was, and had been, common ground throughout the trial, and their Lordships do not consider that the judge's observations on this matter could have misled the jury. Moreover, when the jury were recalled in order that the judge might correct the words "the wholly insufficient reason which the "accused has given" which he had used in his summing-up and substitute in their stead the words "and wholly failed to give any "reason for so doing," he added: "You may think he was mad "for having killed the deceased and wholly failed to give any "reason for so doing." The original language had been used with reference to madness in the popular sense of the word as distinguished from legal insanity, and the substituted words must be read in the same context, but the whole passage at page 69 of the record tends to emphasise the motiveless nature of the crime.

Finally, it is said that the summing-up did not put the case for the defence and the medical evidence fairly or sufficiently before the jury. On this aspect of the case the Full Court of the Supreme Court of South Australia subjected the judge's charge to the jury and the evidence at the trial to a careful and detailed scrutiny, they referred to the authorities which have stated the principles—if they can properly be so called—upon which an appellate court in a criminal case will quash a conviction on the ground of misdirection or non-direction with regard to the evidence given at the trial or the presentation of the defence, and came to the conclusion to quote their words—"In the present case it is "manifest that the point upon which Mr. Elliott relied was before "the jury from first to last through the whole hearing. Applying "the rule laid down in the case *Immer and Davis*[12] we think "that the summing-up of the learned trial judge was sufficient."

Their Lordships have gone through the same process and are content to adopt as their own the words quoted above.

In the result, for the reasons indicated, their Lordships after anxious consideration of the questions raised in this appeal, some

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[12] (1917) 13 Cr.App.R. 22.

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of which are of great importance in the administration of justice in murder cases involving the defence of insanity, are of opinion that no sufficient grounds have been established in this case to justify an appellate court in quashing the verdict and judgment of the trial court. In conclusion, their Lordships may perhaps permit themselves to refer to the concluding words of the judgment of the Full Court of the Supreme Court of South Australia: "While "we really have no doubt that the verdict was right in point of "law (in so far as the appellant must be taken to have known "what he was doing and that it was wrong) nevertheless we think "that there is ground for surmising that the appellant may have "suffered from some such abnormality of mind as might, under the "recent amendment of the law in England [the Homicide Act, "1957, s. 2 (1)], be held to diminish his responsibility. That "opinion is based very largely upon the evidence of Dr. Shea," and, without expressing any view one way or the other with regard to the correctness of the verdict which they think would be outside their province, to express their concurrence in the concluding words of the observations quoted above.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the High Court set aside and the verdict and judgment of the trial court restored.

Solicitors: *Blyth, Dutton, Wright & Bennett; Lawrence Jones & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1959
June 4, 8, 9;
July 16.

OSTIME (INSPECTOR OF TAXES) . . APPELLANT;

AND

AUSTRALIAN MUTUAL PROVIDENT SOCIETY . . . . RESPONDENT.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom—Assessments to income tax on life fund interest—

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* *Present*: LORD RADCLIFFE, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING and LORD BIRKETT.

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Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. I, Sch. D, Rules applicable to Case III, r.* 3—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 430—*Double Taxation Relief (Taxes on Income) (Australia) Order,* 1947 (*S.R. & O.,* 1947, *No.* 806), *Sch., art. II* (1) (i), (3); *art. III* (2), (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a branch office in London, in the United Kingdom. For the years 1947–48 to 1953–54 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund "interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1] The

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[1] Income Tax Act, 1918, Sch. I, Sch. D: "Case III. Tax in respect "of profits of an uncertain value and "of other income described in the "rules applicable to this Case . . . "r. 3: (1) Where an assurance com"pany not having its head office in "the United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com"pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received shall, to the extent pro"vided in this rule, be deemed to be "profits comprised in this Schedule "and shall be charged under this "Case. (2) Such portion only of the "income from the investments of the "life assurance fund for the year "preceding the year of assessment "shall be so charged as bears the "same proportion to the total income "from those investments as the "amount of premiums received in "that year from policy holders resi"dent in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom "bears to the total amount of the "premiums received by the company. ". . . (3) Every such charge shall be "made by the special commissioners "as though the company under the "provisions of this Act had required "the proceedings relating to the "charge to be had and taken before "those commissioners. (4) Where a "company has already been charged "to tax, by deduction or otherwise, "in respect of its life assurance "business, to an amount equal to "or exceeding the charge under this "rule, no further charge shall be "made under this rule, and where "a company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sch., art. II: "(1) In the present "agreement, unless the context other"wise requires . . . (f) the terms "'United Kingdom resident' and "'Australian resident' mean respec"tively any person who is resident "in the United Kingdom for the "purposes of United Kingdom tax "and is not a resident of Australia "for the purposes of Australian tax "and any person who is a resident "of Australia for the purposes of "Australian tax and is not resident "in the United Kingdom for the "purposes of United Kingdom tax ". . . (h) the terms 'United King"'dom enterprise' and 'Australian "'enterprise' mean respectively an "industrial or commercial enterprise "or undertaking carried on by a "United Kingdom resident and an "industrial or commercial enterprise taxpayer appealed and the special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to notional profits

"or undertaking carried on by an Australian resident; and the terms "'enterprise of one of the territories' "and 'enterprise of the other territory' mean a United Kingdom enterprise or an Australian enterprise, "as the context requires; (i) the term "'industrial or commercial enterprise "'or undertaking' includes an enterprise or undertaking engaged in "... the business of ... insurance, "life insurance or dealing in investments, and the term 'industrial or "'commercial profits' includes profits "from such ... business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remuneration for personal services. ... "(3) In the application of the provisions of the present agreement "by one of the Contracting Governments any term not otherwise "defined shall, unless the context "otherwise requires, have the meaning which it has under the laws "of that Contracting Government "relating to the taxes which are the "subject of the present agreement."

Art. III (2): "The industrial or "commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment "situated therein. If it is so "engaged, tax may be imposed on "those profits by the United Kingdom, but only on so much of them "as is attributable to that permanent "establishment: Provided that "nothing in this paragraph shall "affect any provisions of the law of "the United Kingdom regarding the "imposition of excess profits tax and "national defence contribution in the "case of interconnected companies. "(3) Where an enterprise of one of "the territories is engaged in trade "or business in the other territory "through a permanent establishment "situated therein, there shall be "attributed to that permanent establishment the industrial or commercial profits which it might be "expected to derive in that other "territory if it were an independent "enterprise engaged in the same or "similar activities and its dealings "with the enterprise of which it is a "permanent establishment were dealings at arm's length with that "enterprise or an independent enterprise; and the profits so attributed "shall be deemed to be income "derived from sources in that other "territory. ..."

Income Tax Act, 1952, s. 430: "(1) Where an assurance company "not having its head office in the "United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the company from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent provided in this section, be deemed to "be profits comprised in Schedule D "and shall be charged under Case "III thereof. (2) Such portion only "of the income from the investments "of the life assurance fund for the "year preceding the year of assessment shall be so charged as bears "the same proportion to the total "income from those investments as "the amount of premiums received "in that year from policy holders "resident in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom bears "to the total amount of the premiums "received by the company: Provided "that in the case of an assurance "company having its head office in any "part of Her Majesty's dominions "outside the United Kingdom, in India "or in the Republic of Ireland, the "Commissioners of Inland Revenue

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of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that the Order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer:—

Held (Lord Denning dissenting), that the taxpayer's taxable surpluses were properly described as "industrial or commercial "profits" within the meaning of the Order of 1947, and the taxpayer was assessable in accordance with article III, paragraphs (2) and (3) of the Schedule to the Order and not under rule 3 of Case III the provisions of which, for present purposes, had been superseded by the terms of the Order.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388 considered.

Per Lord Denning. The taxpayer did not make any "profits" from its business within the meaning of the Order of 1947. But it was assessable to tax under rule 3 of Case III upon a proportion of its world "investment income."

Decision of the Court of Appeal [1959] Ch. 427; [1958] 3 W.L.R. 354; [1958] 2 All E.R. 665 affirmed.

"may, by regulation, substitute some "basis other than that prescribed in "this subsection for the purpose of "ascertaining the portion of the income "from investments to be so charged "as being income derived from business carried on in the United "Kingdom. (3) Every such charge "shall be made by the Special Commissioners as though the company "had, under this Act, required the "proceedings relating to the charge "to be had and taken before those "Commissioners. (4) Where a company has already been charged to "tax, by deduction or otherwise, in "respect of its life assurance business, to an amount equal to or "exceeding the charge under this "section, no further charge shall be "made thereunder, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced. (5) Where, by virtue of "this section, an assurance company "is charged under Case III of "Schedule D on a proportion of the "income from the investments of its "life assurance fund or on a basis "substituted therefor, the relief "under section 425 of this Act in "respect of expenses of management "shall be calculated by reference "to a like proportion of its total "expenses of management for the "year, estimated according to the "provisions of this Part of this Act. "(6) Subsection (3) of section 131 "of this Act (which provides that "income chargeable under Case III "of Schedule D may in certain cases "be assessed and charged in one sum) "shall not apply to tax in respect of "income to which subsection (1) of "this section applies."

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated June 4, 1958, dismissing an appeal by the Crown from, and affirming an order of, Upjohn J. dated December 20, 1957, whereby an appeal by the Crown upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of those commissioners affirmed.

The question at issue in the appeal was one of construction of the provisions of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, which was given statutory force as respects United Kingdom income tax by section 51 of the Finance (No. 2) Act, 1945 (now section 347 (1) of the Income Tax Act, 1952). The material facts, which were not in dispute, were that the respondent taxpayer company, the Australian Mutual Provident Society, was a mutual insurance society established in New South Wales in 1849, incorporated in 1857 under an Act of the legislature of the then colony of New South Wales, and now regulated by a more recent Australian Act and had been at all material times an assurance company to which the Assurance Companies Act, 1909, applied, carrying on, inter alia, the business of life insurance from its head office in Sydney, and also from a branch office in London. The question which arose on those facts was whether the Relief Order, inasmuch as it provided that the "industrial or commercial profits" of an Australian enterprise should not be subject to United Kingdom income tax save as therein set forth, had the effect of rendering incompetent in law assessments to United Kingdom income tax made upon the taxpayer company under those provisions of the Income Tax Acts of 1918 and 1952 which impose, upon an assurance company not having its head office in the United Kingdom but carrying on life assurance business through a branch or agency in the United Kingdom, a charge to United Kingdom income tax in respect of a specified proportion of the income from its world-wide life insurance fund.

The determination of the special commissioners was made on an appeal to them by the taxpayer company against assessments to income tax made upon it for the years 1947–48 to 1953–54 inclusive, the assessments in respect of the five earlier years having been made under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and in respect of the last two years under section 430 of the Income Tax Act, 1952.

The special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Relief Order of 1947 was capable of applying to the notional profits of a mutual insurance society) profits attributable to the company's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the company being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The case stated on the appeal from the decision of the commissioners is sufficiently set out in the report of the hearing before Upjohn J.[2]

On appeal by the Crown, Upjohn J. and the Court of Appeal upheld the determination of the commissioners. The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown. The respondent society is a mutual society, incorporated in New South Wales, Australia, with its head office in Australia, which carries on life assurance there and, through a branch office, in London. Rule 15 of Cases I and II of Schedule D provides that for an assurance company resident in the United Kingdom the business of life assurance is to be treated as a separate business distinct from any other business it may carry on. A distinction must be drawn between a non-mutual company resident in the United Kingdom and a mutual company so resident. As regards a non-mutual company, the company carries on a trade, in theory chargeable under Case I of Schedule D. The investment income of the company is chargeable either under Schedule C or Case III of Schedule D, and that is normally the only effective charge on the company. In the case of a mutual society resident here there is the same charge upon the investment income. In that case that is the only basis of charge, even in theory, because such a company is incapable of making a profit from its trade.

As to foreign assurance companies resident outside the United Kingdom, they are subject to taxation under the same heads of charge as companies resident here, together with the important addition that such a company is chargeable with tax under Case III of Schedule D in respect of the British proportion of its world investment income. It was the general view that that provision prescribed an artificial method of ascertaining and charging the investment income of a foreign assurance company. But by virtue of *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*[3] the new rule (rule 3 of Case III of Schedule D) introduced by the Finance Act, 1915, must be regarded as prescribing a new fictional profit to every foreign assurance company carrying on business in the United Kingdom. It is not the case of a foreign assurance company earning an actual profit calculated in an artificial manner but of a purely fictional or notional profit.

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[2] [1958] Ch. 774; [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305.

The question in this appeal is how is that fictional profit affected by the Double Taxation Relief Agreement with Australia? An Australian enterprise is chargeable on its industrial or commercial profits earned in the United Kingdom by its permanent establishment here to the extent to which it could be expected to have earned those profits if it had been an independent enterprise. On this arises the question whether the notional profit with which an Australian company is chargeable under the Finance Act, 1915, is an industrial or commercial profit within the Double Taxation Agreement. The respondent company contend that it is such a profit, and the result is that the return is always nil. The Crown, on the other hand, contend that the Agreement has nothing to do with notional profits at all and that, therefore, the company is chargeable in precisely the same way as it was before the Agreement came into force.

Rule 3 of Case III of Schedule D brought into existence a new type of income, namely, a purely notional profit of a mutual assurance company which is entirely sui generis. If it is investment income notionally calculated, the Crown is entitled to succeed, but if it is profit of a trade the Crown fails. When the Agreement was signed in 1946, which was before the decision of the House of Lords in the *Australian Mutual Provident Society* case,[4] it was the general opinion that it was investment income notionally calculated. In that case it appears to have been overlooked by Viscount Simon and Lord Wright that the respondents were a mutual society, for otherwise it would have been impossible for them, in view of previous decisions of the House, to hold that a mutual assurance company derives an actual profit from its operations—call it a trade or what one will: *New York*

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[3] [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388.

[4] [1947] A.C. 605.

Life Assurance Co. v. *Styles* [5] and *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association Ltd.*,[6] which were not cited in that case.

The Agreement, which is contained in the Schedule to the Order, by article II defines in an exclusive sense an "industrial "or commercial enterprise or undertaking," and the term "industrial or commercial profits" does not include income in the form of dividends or interest. Does the expression "profits from "the business of life assurance" in article II (1) (i) include this rule 3 profit as interpreted by the House of Lords in the *Australian Mutual Provident Society* case? [7] It is submitted that that definition is concerned with actual profits only. If the proper view of that decision is that rule 3 income is no more than dividend investment income measured in a certain way, then clearly the definition in article II (1) (i) does not apply, because such income is expressly excluded.

If it is said that the expression "industrial or commercial "profit" includes a notional profit, then it is material to ask whether it includes those notional profits in existence at the date of the Order or all notional profits which might arise in the future. It cannot be the latter, and if it be the former, then there is the fatal objection that the measurement provisions in article III (2) will always result in such notional profit coming out at nil. The absurdity of this position is an argument in favour of rejecting the respondent company's contentions.

There is no authority that gives assistance on the construction of the Relief Order itself. The agreement in article II (1) (i) cannot have the meaning attributed to it by the respondents, because the context otherwise requires, bearing in mind the nature of the profits and the fact that the measurement provisions fail to apply to them. In article III (3) the word "derive" is a very odd word to use if it is meant to refer to a notional profit.

Upjohn J.[8] treats the House of Lords as deciding in the *Australian Mutual Provident Society* case [9] that the rule 3 profit is a trading profit; that is, that one looks upon the surplus as a trading profit and then charges that trading profit by a measurement prescribed in the rule. But the House could not have so decided in view of the terms of the rule and in view of the fact that the respondent company is a mutual society. It is emphasised that what the House of Lords held was that the profit in question was a notional profit of a certain amount and it was the notional profit which fell to be charged. If there was an actual profit, the agreement would plainly apply to it, but there is no actual profit.

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[5] (1889) 14 App.Cas. 381; 5 T.L.R. 621; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 T.C. 460.

[6] (1946) 62 T.L.R. 317; [1946] 1 All E.R. 637; sub nom. *Ayrshire Employers' Mutual Insurance Association Ltd.* v. *Inland Revenue Commissioners*, 27 T.C. 331.

[7] [1947] A.C. 605.

[8] [1958] Ch. 774, 783.

[9] [1947] Ch. 605.

The word "actual" connotes in relation to a trading company a situation where there is in fact a surplus of income receipts over income outgoings. There must be a trade capable of earning income receipts over income outgoings. On arriving at the sum chargeable by using the measurement provided by the statute that sum is the actual profit. A mutual society, however, is incapable of making a profit; it can only make a surplus. If one treats a mutual society as making a profit, that profit must be a fictitious "something" which cannot exist in reality. If the legislature had intended this sum so ascertained to be deemed to be a trading profit Case III would have been a most extraordinary place in which to find it, since Case I concerns trading profits. Rule 3 does no more than prescribe a measurement of investment income. It may be that in view of the *Australian Mutual Provident Society* case [10] it creates a separate class of profit. But that decision does not go so far as to say that a company incapable of making a trading profit shall be *deemed* to make a trading profit. It merely makes a profit.

If the Court of Appeal's decision in the present case is correct, then rule 3 is no longer applicable and the measure of the respondents' liability is to be found in article III, leaving aside investment income; what has to be determined is the profit that the enterprise might be expected to derive in the United Kingdom if it were an independent enterprise engaged in the business of life assurance in the United Kingdom. If the enterprise is non-mutual, then the answer is the trading profit, if any, which it might be expected to earn—in the present case, nil. If the enterprise is a mutual society, then, even in theory, there can be no trading profit, so here also the result is nil. There only remains the rule 3 notional income itself, which, on this view, represents industrial or commercial profits within article II (1) (i). But the question then arises how one would calculate the amount of the rule 3 profit that that independent enterprise engaged here might be expected to derive in the United Kingdom, since such an

[10] [1947] Ch. 605.

independent enterprise could not derive any profit. Accordingly, the Relief Order has the strange effect of bringing a rule 3 profit under article II (1) (i) notwithstanding that when it is calculated under article III (2) and (3) it is always nil. That is a cogent reason for saying that such a construction is contrary to the intention of the agreement.

In relation to different heads of charge the word "profit" means different things. Investment income is pure income profit. As to trading profits, a trader carries on a trade for a given period of account during which he has actual receipts and actual outgoings, and his actual profit is based on that; then his income for any given fiscal year is his profit for the period of account preceding the end of such fiscal year. In other words, an actual profit is based on something real in contradistinction to a notional profit.

With regard to the scope of the phrase "profits from life "insurance" in article II (1) (i), the excluding words of (i)— "but does not include income in the form of dividends, interest ". . ."—are sufficient to cover and to exclude expressly the notional profit which arises under rule 3 of Case III. The above-quoted expression is a curious one and is particularly appropriate in the present context. This rule 3 income is properly described as "in the form of dividends, interest"—in the shape of dividends, interest; the rule 3 profit is a kind of notional emanation from that actual dividend income. The rule 3 income can properly be said to be received by the enterprise in the form of dividends and interest. Accordingly, rule 3 income is excluded expressly. If that contention be rejected, then the question arises: does the word "profits" read in this context include the notional profits under rule 3, Case III? That is a question of construing the agreement as a whole, and it is necessary then to ascertain how the agreement would deal with "profits" if it included notional profits. For this purpose it is relevant to consider article III (2) and (3).

In the case of an actual profit these provisions work perfectly well. In the case of a rule 3 profit they will not work for the reasons stated previously. The hypothesis is that a United Kingdom branch of an Australian mutual life assurance company is an independent enterprise as such in the United Kingdom. No such independent enterprise carrying on business in the United Kingdom could make a rule 3 profit, for that profit can only be made by a foreign insurance company. A mutual life assurance company carrying on business here could not make any profit in the United Kingdom because it is *incapable* of *making* a *profit*.

There are three things which the parties to the agreement might have done: (1) they might have included a rule 3 profit as a profit under article II (1) (i) to be within the agreement and then provided a yardstick for measuring such profit; alternatively, (2) they could have swept away altogether rule 3 profits; but (3) what they could not sensibly have done was to bring rule 3 profits under profits to be dealt with under the agreement and then to attribute to them such a principle of measurement that the result would always be nil.

If this notional profit was intended to fall within the scope of the agreement, one would have expected (a) the permanent establishment here, the branch, to earn a profit of some real amount; (b) in Australia, the tax which the Australian company had to pay here in respect of that profit to be deductible for Australian tax purposes. But that scheme does not fit this agreement: see article XII (2).

In conclusion, in rule 3 (1) the subject of charge is the world investment income with a proportion applied to it. This notional profit comes within the express words of exclusion in article II (1) (i). The charge under rule 3 is upon the world investment income of the company which is in the form of dividends and interest. It is nonetheless so, that in working out such income the House of Lords has held [11] that that profit is a general profit of the business. The fact that in general Parliament have treated it as investment income rather than trading income is sufficiently shown by the fact that it is chargeable under Case III and not under Case I of Schedule D. It is much more likely that in making this agreement the contracting governments should have had in mind the actual income received by any enterprise of the two countries rather than any notional income.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer. The case for the Crown can be stated thus: the subject-matter of charge under Case III of Schedule D is not industrial or commercial profits within article III (2) of the agreement and, therefore, it is not within the terms of the Double Taxation Agreement. Accordingly, the central question in this appeal is: what is the subject-matter of charge under article III (2)? The respondents submit that it is the annual profits of the society's life assurance business carried on in the United Kingdom and that such profits fall fairly and squarely within the words "industrial or commercial profits" in article III (2) and (3).

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[11] [1947] A.C. 605.

As to the subject-matter of charge under Case III of Schedule D, rule 3 first appeared in section 15 of the Finance Act, 1915, when the main body of income tax law was contained in the Income Tax Act, 1842. That Act contained the familiar five schedules, but the basis of charge under Schedule D was quite different from what it later became. The Third Case related to profits of an uncertain annual value and the basis of charge was the profits of the preceding year. In 1915 the legislature was minded to bring in this new charge on foreign assurance companies carrying on business in the United Kingdom. The charge was based with reference to income from investments received in the preceding year, and not on a basis of a three-year average. Case III is the only Case available, and that was the manifest and only reason for so placing this charge under the Third Case (as Case III was then called).

It was said that trading profits are not to be found under Case III, but that statement is only accurate for the period subsequent to 1948. Between 1842 and 1948 there were certain trading profits which came under the Third Case and Case III; for example, under the Third Case there was a charge in certain circumstances on the profits of dealers in cattle and sellers of milk.

The object of the legislature in the Act of 1915 was to charge foreign assurance companies and, more particularly, to ensure contributions from foreign mutual assurance companies. A foreign proprietary company could always be taxed under Case I even although it was difficult to make an assessment on such a company. A foreign mutual society, however, was in a favourable position in comparison with an English mutual society, since its foreign investments were not subject to English tax because the company was considered a non-resident although it had an office in the United Kingdom and carried on a considerable business here. It could, therefore, offer better terms than an English mutual society.

It is submitted that in rule 3 (1) of Case III of Schedule D this foreign investment income is, to the extent provided by the rule, to be deemed to be *business* profits of the life assurance business carried on by the company in question, for it would hardly be necessary to provide that the dividend income of the company should be deemed to be *profits* simpliciter. In other words, it is not providing that such income should be deemed to be profits or gains in the wide sense of everything caught by the Income Tax Acts. In rule 3 (2) there is a clear indication that the income caught by the rule is derived from the company's business. Further, rule 3 (4) shows plainly that all dividend income of a life assurance company is regarded by the legislature as income related to its life assurance business, for otherwise the rule has no meaning. Any doubt on this question, however, is removed by the decision of the House of Lords in the *Australian Mutual Provident Society* case,[12] where it was specifically held that the subject-matter of charge under rule 3 is business profits.

By virtue of article II (3) of the agreement the word "profits" in article II (1) (i), unless expressly qualified, includes everything which is the subject-matter of charge under the Income Tax Acts. Accordingly, the expression "industrial or commercial profits" in article II (1) (i) includes profits from the business of life assurance but not income in the form of dividends, and such profits can fairly be taken to mean business profits. It is plain from the *Australian Mutual Provident Society* case [12] that whatever view be taken of the subject-matter of charge under rule 3 of Case III, it certainly is not profits in the form of dividends. In article II (1) (i) "industrial and commercial" profits will include, prima facie, income in the form of dividends and rule 3, Case III, profit. The former is expressly excluded, but there is nothing in that article or at all to exclude the rule 3 profit.

The Crown's objection to this contention is threefold: (a) It is said that what is charged under rule 3 of Case III are notional as distinct from actual profits. But that is to confuse measure with subject-matter. There is nothing odd in the concept of a notional charge for income tax purposes. For example, let it be supposed that in the year 1958–59 a business sustains a loss. Nevertheless under Case I of Schedule D there has to be an assessment made for the year 1958–59 arrived at by reference to the figures of the previous year, when there was a profit of, say, £50,000. It is submitted that that is a charge on a notional profit, for there was no profit made in the year 1958–59.

(b) Then it is said that the House of Lords could not have intended to hold in the *Australian Mutual Provident Society* case [12] that what are to be charged are trading profits, because a mutual assurance society, in the Crown's submission, cannot have trading profits. But there is no reason why the legislature should not impute a trading profit, business profit or any other profit to a mutual society: see *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners.*[13] It is submitted that that is what section 15 of the Finance Act, 1915, effected in introducing rule 3 of Case III.

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[12] [1947] A.C. 605.

(c) Finally, it is said for the Crown that whatever be the effect of the decision of the House of Lords in 1947, the agreement was made in 1946, and that, therefore, it must be construed in the light of the surrounding circumstances, which were that in 1946 it was universally considered that the subject-matter of charge under rule 3 of Case III was dividends and not business profits. But where is the evidence to support that contention? Further, this agreement is not unique but is one of many similar agreements, and those which were signed after the decision of the House of Lords in 1947 are couched in language indistinguishable from that used in the present agreement.

In conclusion, it is emphasised that the decision of the House of Lords in 1947 clearly establishes that the subject-matter of charge under rule 3 is not investment income but profits from the business of life assurance, and it is plain, therefore, that Rowlatt J.'s construction of the rule 3 charge in *Equitable Life Assurance Society of the United States* v. *Hills* [14] can no longer stand.

Pennycuick Q.C. in reply. The respondents appear to have resiled from their first contention that the House of Lords decided in 1947 that a rule 3 profit was a trading profit, that is, that any foreign life assurance company must be considered as carrying on a trade, whether it is a proprietary or mutual society; and the respondents, having thus disclaimed that the profit in question was a rule 3 notional profit, are now contending that it is profit derived from the business, that is, "the undertaking."

The first question is whether the words of exclusion in article II (1) (i) apply to this particular profit, for article II (1) (i) does not apply to all profits. Is the rule 3 profit as explained in the *Australian Mutual Provident Society* case [15] profit "in the form "of dividends or interest"? If it is, then it is not within the ambit of the expression "industrial or commercial profits." It is submitted that the *Australian Mutual Provident Society* case [15] decided that the rule 3 charge is not upon the specific income from investments but upon the proportion of that specific income.

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[13] [1926] A.C. 281; 12 T.C. 841, 864.

[14] (1924) 8 T.C. 657.

[15] [1947] A.C. 605.

but not treated as such, in the general profit of the business. The case was concerned with the question whether there was a charge in relation to specific income. The furthest that the House of Lords went was to say that although the company was only charged on a proportion of specific income, that proportion was being treated as a notional profit. What is charged is an abstraction received in the form of specific income. The specific income is received, that is, the specific income generates the abstraction. The abstraction is somehow to be received by the company. The only form in which it can be received is as specific income. It is in truth a proportion of the dividend income. To take an analogous case, where under a will or settlement an annuity is charged on the income of the fund, it is well established that, although the annuitant has an interest in every item of that fund, he has no equitable interest in *any specific item* of that fund. Rule 3 never goes beyond seeking to charge investment income which it then cuts down to a proportion of such income.

If, as is admitted, the income in question is not income from a trade and the Crown are wrong in their contention that it is income in the form of "dividends" or "interest," then the question arises whether on its true construction the expression profit, in the context of the agreement, notionally extends to an item of notional profit. It is submitted that, prima facie, the answer is in the negative, and this is reinforced by the provisions of article III in working out the charge. Article III determines whether the definition in article II (1) (i) covers this notional profit. The context imperatively requires that the word "profits" in article II (1) (i) should not include this notional rule 3 profit. This appears from article III (2) and (3). Article III (2) unequivocally contemplates that the profit earned by the Australian enterprise in the United Kingdom, or at least some part of it, may be attributed to its permanent establishment here; that is the measure of its liability. The measure is applicable to the trading profit, if any, which may be derived in the United Kingdom from a proprietary Australian life assurance society. There is no question of the agreement not working at all in relation to the profits of life assurance. It works in the case of a proprietary Australian life assurance society. That was conceded. Then came the question how, if at all, can the measure work in relation to a rule 3 notional profit whether the Australian society be mutual or proprietary? It is submitted that in no circumstances can it work in relation to this rule 3 profit. Article III (3) provides the answer. That hypothesis can never fit this rule 3 profit, because if the branch were an independent enterprise engaged in life assurance in the United Kingdom, the branch could never conceivably derive this notional profit, which is only attributable by the language of rule 3 itself to a foreign company, both proprietary and mutual.

If the expression "profits" in article II (1) (i) includes this rule 3 profit, then it is only brought in to be nullified by article III (2) and (3). The proper inference to draw from that is that the expression profits in article II (1) (i) does not include the notional Case III profit at all, and the context imperatively requires that conclusion.

The respondents accept the position that article III (2) and (3) will produce a nil result in respect of a mutual society but submit that it also applies to a proprietary company. The respondents then contend that the agreement gives the "go-by" to rule 3 profit. It is submitted that it only gives the go-by in the sense that it does not deal with such a profit at all. It does not give the go-by by abrogating the rule 3 profit altogether. If that was the contention the agreement would have been couched in different terms. This charge had been in existence at the date of the agreement for some 30 years. If it had been the intention of the parties to the agreement to abrogate the charge altogether, then they would surely have done so in express terms. If it be held that they have abrogated this charge, then it is a fair comment that they have done so in the most oblique manner.

The expression "industrial or commercial profits" has to be construed in its context. This rule 3 notional profit is not what one would expect to be dealt with under "industrial or commercial profits" in this agreement, for primarily they connote trading profits. Accordingly, one would not expect this notional profit, which is primarily investment income, to come within the ambit of "industrial or commercial profits" without express words of inclusion, but, on the contrary, the agreement contains strong indications that such a profit is excluded.

A further argument in support of the above contention is provided by the circumstances surrounding the making of the agreement. For the purpose of construing it the relevant date is that of its execution and not the date of its coming into operation. At the date of its execution, October 29, 1946, the legal position was that by virtue of *Equitable Life Assurance Society* *of the United States* v. *Hills*[16] a rule 3 profit was looked upon as being in the nature of investment income. It must be assumed that the high contracting parties to this agreement by their agents must have known the income tax law of their respective countries. It follows that at the date when the agreement was signed the parties to it were under the mutual belief that a rule 3 profit was in the nature of investment income. Accordingly, in article II (1) (i) they must have intended to exclude the rule 3 profit. For this purpose, the relevant law is the law as it stood at the date of the execution of the agreement and not what it was later held to be by the House of Lords in 1947.

Their Lordships took time for consideration.

July 16, 1959. LORD RADCLIFFE. My Lords, the sole question raised by this appeal is whether the respondent, an Australian life assurance company, can be lawfully assessed to income tax in this country under rule 3 of Case III of Schedule D to the Income Tax Act, 1918 (or, as the rule has become, section 430 of the Income Tax Act, 1952), having regard to the obligations undertaken by the Government of the United Kingdom in the Double Taxation Relief Agreement entered into with the Government of the Commonwealth of Australia on October 29, 1946. The question itself is said to be a short one, as in one sense it is: but it is not so easy to state it shortly, and, since its solution requires a certain amount of introductory matter, I must ask leave to take a rather longer time than I should have wished in setting my opinion before your Lordships.

The relevant facts are these. The respondent is a mutual insurance society incorporated in the state of New South Wales. It has its head office in Sydney and a branch office in London: from these offices it carries on a business of life assurance. It is not in dispute that for the purposes of taxation in this country its life assurance business is to be treated as a business separate from any other class of business carried on by it and the assessments which are the subject of appeal are confined to the income or profits of that business.

These assessments relate to a number of years, beginning with the revenue year 1947–48 and ending with the year 1953–54. Those for the first five years were made under rule 3 of Case III of Schedule D to the Income Tax Act, 1918; those for the last two under section 430 of the Income Tax Act, 1952, which Act replaced the earlier Act in the process of consolidation. As the provisions of the two Acts do not differ in any relevant particular I shall speak throughout of rule 3 as the governing statutory provision. The course that the case has taken in the courts below is that the assessments raised by the appellant were discharged by the special commissioners on the respondent's appeal and the order of the special commissioners has been upheld in the High Court (Upjohn J.) and in the Court of Appeal (Jenkins, Parker and Pearce L.JJ.). In all courts hitherto the same view has prevailed, that there is a conflict between the provisions of rule 3 and those provisions of the Double Taxation Relief Agreement which deal with the taxation of industrial or commercial profits and that this conflict precludes for the future an effective assessment under the rule. I should add at this point that the agreement became municipal law of this country by virtue of an Order in Council made on April 23, 1947, under the authority given by section 51 (1) of the Finance (No. 2) Act, 1945, which allows the enactment by such Orders of the arrangements contained in double taxation relief agreements and prescribes further that the arrangements covered by an Order shall have effect in relation to income tax notwithstanding anything in any enactment "so "far as they provide for relief from tax, or for charging the "income arising from sources in the United Kingdom to persons "not resident in the United Kingdom, determining the income "to be attributed to such persons and their agencies, branches "or establishments in the United Kingdom, . . ." It is plain, therefore, that, if there is a conflict, the unilateral legislation of the United Kingdom must give way.

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[16] 8 T.C. 657.

The decisions in the High Court and the Court of Appeal were dominated by the view taken in those courts as to the effect of the opinions delivered in this House in an earlier case involving the present respondent, which is reported as *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*.[1] Both courts treated that case as deciding that the rule 3 assessment was an assessment and therefore a tax upon the profits of the business of life assurance and as such was a tax upon commercial profits within the meaning of the Double Taxation Relief Agreement. I do not think that the first part of this proposition has been denied at any stage by the argument for the Crown, though it challenges the deduction to be drawn from it as to the

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[1] [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388.

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interpretation of the agreement. However that may be, I am reluctant that the issue of this appeal should be determined by any exclusive reliance upon what was said by members of this House in the earlier case, since the point that had then to be decided, relating as it did to the applicability of certain provisions about tax-free interest to a rule 3 assessment, has no direct bearing upon the present dispute, and in any event nothing said by the House in 1947 could amount to an interpretation of the words "commercial or industrial profits" in the agreement, which was not then before them. I therefore defer until later any further reference to this case.

My Lords, I think that what has to be done is first to ascertain what was the nature of the taxation imposed by rule 3, so far as that very special enactment admits of any clear categorisation, and then to ask whether or not taxation on that basis can still be imposed consistently with the obligations undertaken by the United Kingdom under the Double Taxation Relief Agreement. I will set out rule 3 in the form in which it appears in the Income Tax Act of 1918, but before I do so I must make one cautionary remark. The framers of the rule were concerned to extract what seemed to them a fair quantum of tax from what had hitherto been an unsatisfactory situation. They were not concerned with precise distinctions between commercial and investment income, which in any event do not always admit of such distinction: nor could they be expected to foresee either the contents or the wording of the Double Taxation Relief Agreements which have become a feature of post-1946 tax administration.

"3.—(1) Where an assurance company not having its head "office in the United Kingdom carries on life assurance business "through any branch or agency in the United Kingdom, any "income of the company from the investments of its life "assurance fund (excluding the annuity fund, if any), wherever "received shall, to the extent provided in this rule, be deemed "to be profits comprised in this Schedule and shall be charged "under this Case.

"(2) Such portion only of the income from the investments "of the life assurance fund for the year preceding the year of "assessment shall be so charged as bears the same proportion "to the total income from those investments as the amount of "premiums received in that year from policy holders resident in "the United Kingdom and from policy holders resident abroad "whose proposals were made to the company at or through its "office or agency in the United Kingdom bears to the total "amount of the premiums received by the company:

"Provided that in the case of an assurance company having "its head office in any British possession, the Commissioners of "Inland Revenue may, by regulation, substitute some basis "other than that herein prescribed for the purpose of ascertaining the portion of the income from investments to be so "charged as being income derived from business carried on in "the United Kingdom.

"(3) Every such charge shall be made by the special com"missioners as though the company under the provisions of this "Act had required the proceedings relating to the charge to be "had and taken before those commissioners.

"(4) Where a company has already been charged to tax, by "deduction or otherwise, in respect of its life assurance business, "to an amount equal to or exceeding the charge under this rule, "no further charge shall be made under this rule, and where a "company has already been so charged, but to a less amount, "the charge shall be proportionately reduced."

Rule 3 first became law in 1915, being introduced by section 15 of the Finance Act of that year. The situation that it was framed to deal with needs to be shortly stated: it arose from a combination of the special difficulties of establishing the true annual profit of life assurance business with the special difficulties of determining the true United Kingdom income of a non-resident life assurance company doing branch business here. If that assurance company was organised on the mutual principle, a further difficulty was superimposed: but this particular difficulty was due to the quirk of English judicial reasoning which absolved a mutual company from the possibility of making a taxable profit and could have been corrected at any time by appropriate legislation.

It had never been easy or convenient to raise an assessment under Case I of Schedule D on a life assurance society in respect of its trading income. To do so involved valuations of liabilities and assets which were not likely to be annually available. On the other hand, life assurance business by its own nature generates the life fund consisting of investments made out of the premium receipts and accumulated income and the produce of those investments is at least an important part of the annual income of the business. So long, therefore, as the investments were such as to yield interest or dividends from a source in the United Kingdom, the interest and dividends themselves fell under charge to tax and, given the allowance to the company of its management expenses, an adequate, though never an accurate measure of the annual profit accruing to the business could be regarded as obtained. Moreover, since 1914 a company with its head office here had been liable on the income of foreign investments, even if not remitted to this country. A foreign assurance company was, however, in a different position. If it did business in the United Kingdom through a branch, it was not itself a resident and, as a non-resident, could not fairly be regarded as taxable in this country in respect either of its world income from investments or, more generally, its world income from life assurance business. So far as its life fund was represented by United Kingdom securities and no special tax exemption attached to them, it was liable to bear tax on the income from the securities. Theoretically, too, it was liable to an assessment under Case I of Schedule D in respect of the profits from its business carried on in the United Kingdom. But then a foreign assurance company might well not keep its life fund or at any rate any substantial part of it invested in United Kingdom securities, so the tax yield on that ground was only a speculative amount: while the problem of raising a valid Case I assessment on the profits of the United Kingdom trade carried on by a branch office which was not even under the obligation of maintaining an independent accounting system was evidently regarded as too vexing for solution.

If it is seen against this background, it is fairly clear what rule 3 was designed to effect. Its purpose was to attribute to a foreign assurance company doing life business here a reasonable sum of income or profits in respect of that business and so to tax that sum as income arising in the United Kingdom. In one sense it charged the income of all the investments of the life fund wherever received and in that sense was a tax on investment income; but the language of the taxing provision and, indeed, the whole scheme of it is so exceptional that I do not think it right to give any determining weight to that consideration. As I have indicated, it was not unusual to regard the income of the life fund as an acceptable alternative to the trading income of the business. In the end it is not the investment income itself that is the subject of tax but the product of a mathematical calculation represented by the income of the whole life fund multiplied by premiums obtained through United Kingdom business over the company's total premium income. It is the sum produced by this calculation that is "deemed to be profits "comprised in" Schedule D and charged under Case III. This

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sum, representing an unidentifiable portion of the income from investments, is "charged as being income derived from business "carried on in the United Kingdom" (see the proviso to rule 3 (2)). I regard these last words as very important, for to my mind they indicate conclusively the nature of the taxing provision as being designed to attribute to the foreign taxpayer a measure of income to represent the income of his United Kingdom business. It follows that the effect of the charge is not to charge investments "as such" or any specific investments. Finally, the fact that, under rule 3 (4), the tax charge turns out to be only a supplementary or covering charge which abates or disappears to the extent that tax is otherwise obtained by deduction from investment income or direct assessment seems to me to make it very difficult to regard the nature of the taxing provision as being other than that which I have described.

The question we have to determine is how this method of attributing a profit to a life assurance company whose head office is outside the United Kingdom stands up against the provisions of the Double Taxation Relief Agreement. I should find nothing surprising in the conclusion that it had been superseded. Rule 3 was an attempt at a unilateral solution of this particular aspect of double taxation in which the Australian taxing authorities were certainly no less interested than the authorities of the United Kingdom. Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed, which, for obvious reasons, employs similar forms and similar language in all agreements, is derived, I believe, from a set of model clauses proposed by the financial commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. For our purpose it is convenient to note that the language employed in this agreement is what may be called international tax language and that such categories as "enterprise," "commercial or industrial profits" and "permanent establishment" have no exact counterpart in the taxing code of the United Kingdom.

Turning then to the agreement, there is no doubt that the respondent is an Australian enterprise and therefore comes within the regulation of article III (2) that its commercial profits are not to be subject to United Kingdom tax at all unless it is engaged in business here through a permanent establishment here. It is conceded that its branch office is such an establishment, and therefore the second part of the regulation applies and tax may be imposed on the respondent's commercial profits by the United Kingdom, but only on so much of them as is attributable to that establishment. It is not left wholly to the will of the United Kingdom taxing authorities to decide the basis on which that attribution of commercial profits is to be made. Article III (3) provides by its terms for a basis which in effect requires the hypothesis that the branch is an independent enterprise dealing as an independent entity at arm's length with the head office. The profits which emerge from a calculation based on this hypothesis are to be " deemed to be income derived from sources in " the United Kingdom."

I do not think that it is open to us to decide what would be the consequences of taxing the respondent's commercial profits according to this new formula. It is by no means easy to see what other hypotheses are required or excluded by the central hypothesis. The sole issue under appeal is whether the respondent can be taxed at all on the rule 3 basis. In my opinion it cannot be, because the world income from the investments of the life fund, which forms the first stage in the rule 3 calculation of profits, cannot be attributed to the hypothetical independent enterprise without violating the very hypothesis which article III (3) is designed to lay down as the basis of taxability.

I did not understand the argument for the Crown to maintain that rule 3 could be applied consistently with an assessment according to article III (3). What was said was that, having regard to the definition of " commercial and industrial profits " in article II (1) (i), assessments under rule 3 were not affected by article III (3), since the profits they charged were not commercial or industrial profits within the meaning of the agreement. With all respect to that argument, it seems to me simply a claim to retain the United Kingdom's unilateral basis of attributing United Kingdom business profits to an overseas life assurance company in despite of the new agreed basis of attribution laid down in article III (3). It is quite true that the definition of " industrial or commercial profits " declares that it " includes " profits from such activities or business but does not include " income in the form of dividends, interest, rents, royalties, . . ." Accordingly, except so far as article VI makes certain special stipulations about double taxation of dividends, the respective claims of the taxing authorities upon items of income such as dividends or interest are not regulated on the "permanent establishment principle" of article III and are left to be taxed according to the local legislation. It would be in accordance with United Kingdom principles to tax all dividends and interest arising from sources in the United Kingdom to whomever accruing, unless specially excepted, but not to tax the foreign income of non-residents. So, in this case, the respondent has regularly borne tax on its United Kingdom interest and dividends; and, for instance, of a total tax claim of £97,961 in respect of the rule 3 assessment for 1953–54, as much as £86,796 is set off by taxes paid by deduction or otherwise under various schedules.

The tax-deducted portion of that is £79,360. Such income is no doubt income "in the form of" dividends or interest for the purposes of article II (1) (i); but when I look round for any other comparable income received in the basis year which could be excluded from the provisions of article III, I find none. Certainly I do not find it in the notional sum of profits attributed under rule 3 to the United Kingdom business, for that sum is not received in the form of dividends or interest and only exists as a measure of profits established by the legislature for the purpose of the attribution, whereas it is just that question whether such a measure is any longer sustainable in face of the Double Taxation Relief Agreement that is the subject of the present dispute. In other words, as I see it, the Crown's argument can only succeed by assuming in its favour the very hypothesis that the agreement displaces by a different standard of calculation.

I have left to the end any detailed reference to the opinions of this House in *Inland Revenue Commissioners* v. *Australian Mutual Provident Association*.[2] The issue in that case was different from this one. It turned on the question how, if at all, a rule 3 assessment should take account of the circumstance that some of the life fund investments were by statute free of tax to holders non-resident or not ordinarily resident. When the case began its progress through the courts the general construction of the nature of the rule 3 charge seems to have been governed by Rowlatt J.'s decision in *Equitable Life Assurance Society of the United States* v. *Hills*.[3] In that case he had spoken of the charge as a charge on the investment income simpliciter[4]: "They

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[2] [1947] A.C. 605.

[3] (1924) 8 T.C. 657.

[4] Ibid. 661.

"are taxed on their investments as such, upon a proportion of "those investments." Putting that construction side by side with the later decision of the House of Lords in *Hughes* v. *Bank of New Zealand*,[5] the Court of Appeal had held that the rule 3 assessment must be adjusted in favour of the taxpayer to reflect the relief on the exempted income. This House was not prepared to accept that conclusion. I think that it is obvious from the opinions of Lords Simon, Wright and Porter that they did not accept Rowlatt J.'s construction of the rule 3 charge. For instance, Viscount Simon is found describing the rule at one point in his speech [6] as one which is made "in respect of the annual "profit of [the company's] life assurance business," and at another [7] as "not one which taxes income from investments." Lord Porter in his speech [8] rejects the argument that the charge is imposed on the income from investments and not on profits. The sum charged, he says, does not represent any real income or profit but is merely arrived at by a conventional calculation adopted for the purpose of estimating an otherwise almost incalculable sum. In the view of Lord Wright [9]: "No specific "investments were taxed. . . . The charge was a tax on the "investment income only as a machinery to tax the general "profits of the British business."

My Lords, I have quoted these extracts at some length, because it is in reliance upon their tenor that the courts below have decided against the Crown in the present case. It is true, I think, that it would have been sufficient for the decision of the earlier case if the House had merely confined itself to pointing out, as Lord Wright did, that the rule 3 charge is not in any case a charge upon any specific investments; for, if that is so, it is very hard to see how to carry the relief on particular items of income into the unappropriated proportion. It is true, too, that there is nothing in the earlier case that could amount to an interpretation of the words "commercial or industrial profits" as defined by the Double Taxation Relief Agreement, the point with which we are most immediately concerned. But, at the same time, I cannot help recognising that the decision was a unanimous decision of the House which was directed to analysing and explaining the true nature of the rule 3 charge, and of what it was that by it was brought under charge, in order to determine

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[5] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.

[6] [1947] A.C. 605, 617.

[7] Ibid. 620.

[8] Ibid. 627.

[9] Ibid. 621, 622.

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the validity of the claim for relief that was under appeal, and I should not think it right to propound in this case any analysis of rule 3 that was materially different from the explanation then given unless I was convinced that it was unmaintainable. As it is, I am not faced with this difficulty, since I agree with the observations of the noble Lords that I have quoted, and my own reading of the statute leads me to the same conclusion.

I notice, only to reject, an argument that was presented to, but not pressed upon, us by the Crown to the effect that, as the date of the making of the Double Taxation Relief Agreement preceded by some months the House of Lords decision in the former case, that agreement ought to be interpreted in the light of the view of the effect of rule 3 that had hitherto prevailed and not in the light of the law as laid down by this House. I do not accept that it would make any ultimate difference even if the earlier view were treated as the only relevant one, but perhaps it is sufficient to say that I do not think that such a method of construction as is proposed ought to be applied to a bipartite taxation treaty of this nature. All that can be said in such an agreement is said by article II (3), and that is not sufficient to assist the appellant's case.

I would dismiss the appeal.

My Lords, my noble and learned friends, LORD SOMERVELL OF HARROW and LORD BIRKETT, who are not able to be present today, have asked me to say that they agree with the opinion that I have just delivered.

LORD TUCKER. My Lords, I agree.

LORD DENNING. My Lords, your Lordships have to consider today the effect of certain arrangements about taxation which have been made between the governments of the United Kingdom and of Australia. These arrangements have been made so as to ensure that persons are not taxed twice over, once by the United Kingdom and once by Australia, on the same income. They have been embodied in an agreement (which I will call the Double Taxation Agreement) and given statutory force in each country. They override any other enactment. Similar agreements in like terms have been made by this country with other countries and by other countries between themselves. The interpretation which your Lordships put upon this Double Taxation Agreement is of more than usual consequence because, if a mistake should be made, it may be well nigh impossible to put it right, for your

Lordships' interpretation will govern this country without any likelihood of change by Parliament. At any rate Parliament itself cannot alter the wording of this Double Taxation Agreement without the consent of both parties to it.

The important thing to notice about the Double Taxation Agreement is that in defining "industrial or commercial profits" it draws a sharp distinction between profits from a business on the one hand (which I will call "business profits") and income in the form of dividends, interest, rents and so forth on the other hand (which I will call "investment income"). It deals with these quite separately. So far as "business profits" are concerned, the Double Taxation Agreement says that henceforward when an Australian company has a permanent establishment in this country, it may be taxed by the United Kingdom on the profits it makes, but only on so much of them as is attributable to its establishment here. The agreement goes on to say how this amount is to be ascertained. It is by means of a given hypothesis. You are to treat the establishment here as if it were completely independent of the Australian head office and were dealing at arm's length with it, and you are to estimate the profits which such an independent enterprise might be expected to derive on its own, and then tax it on the amount so ascertained.

So far as "investment income" is concerned, the tax payable in this country is left untouched by the Double Taxation Agreement. For instance, where an Australian company has investments in this country from which it derives dividends, interest, rents and so forth, it has, of course, to pay tax on that income here by deduction or otherwise. But over in Australia the Australian company, inasmuch as it is an Australian resident, will have to pay Australian tax on all its investment income, wherever derived, including its income from investments in the United Kingdom. The Double Taxation Agreement provides that, when paying this Australian tax in Australia, the Australian company will receive credit for the tax it has paid in the United Kingdom.

Such being the general effect of the Double Taxation Agreement, your Lordships are today concerned with its effect on a very special kind of tax which is imposed here under rule 3 of Case III. It is a tax charged on life assurance companies which have their head office overseas and a branch or agency in the United Kingdom. The critical question is whether it is a tax on profits of the business so as to come within the provisions of the Double Taxation Agreement about "business profits" or whether it is rather a tax on investment income so as to come within the relevant provisions about "investment income."

My Lords, in order to explain the nature of this special tax I would first say a little about the business of life insurance itself. First, take a mutual society. It carries on business on a mutual basis, and it is settled law that it makes no trading profits but only a surplus and is not liable to tax upon that surplus: see *New York Life Insurance Co.* v. *Styles*[10] and *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association Ltd.*[11] But it is, of course, liable to tax on its investment income. Secondly, take a proprietary society. It carries on business on a proprietary basis and may in theory make a trading profit, but there is much difficulty in calculating it. It is difficult to say what profit there is when you receive premiums and may have to pay out big sums at some unknown future time. In any case the actuaries seek to calculate the premiums so that they just cover the risk and there is no profit as such. But a proprietary society, of course, invests its income and receives dividends from it. That is how it makes its money. The result is that in practice a proprietary company is not charged with tax on any trading profit but only on its investment income.

When you are dealing with life insurance companies resident in the United Kingdom, there is no difficulty about applying the Double Taxation Agreement to them. They are resident here and are taxed on their total investment income from the life fund, wheresoever this income is derived, and they are given credit for the tax paid by them in Australia on their Australian investments. But with an Australian society (or any company resident overseas) the position is different. Apart from the special tax which we have to consider, the only tax payable by it in the United Kingdom would be the tax on its investments *here*, and it could avoid paying tax in England by reducing its English investments to a minimum. It could make nearly all its investments elsewhere. It was in order to avoid such a situation, so obviously unjust to English taxpayers, that a special tax was introduced. In 1915 it was enacted that life insurance companies, with head offices overseas, should pay tax on a figure calculated according to a prescribed formula. The formula was this: Take the total income which the company receives from its investments all over the world. Then divide this income up. Divide it into proportions according to the volume of business done in life insurance in this country compared with the business done overseas. (This proportion was usually to be ascertained by comparing the premiums received in this country with those received overseas.) By dividing the world investment income in those proportions, you arrive at a fair figure to represent the proportion applicable to the United Kingdom. The company was to be taxed on the figure so ascertained. These 1915 provisions were afterwards embodied in rule 3 of Case III of Schedule D, and I will refer to them as "the rule 3 provisions."

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[10] (1889) 14 App.Cas. 381; 5 T.L.R. 621; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 T.C. 460.

[11] (1946) 62 T.L.R. 317; [1946] 1 All E.R. 637; sub nom. *Ayrshire Employers' Mutual Insurance Association Ltd.* v. *Inland Revenue Commissioners*, 27 T.C. 331.

The critical question, as I have said, is: What is the nature of this rule 3 tax? Is it a tax on the investment income of the company, or is it a tax on the profits of the business? For it needs must, I think, be put in one category or the other if this Double Taxation Agreement is to work on it. And it is to be remembered that the term "profits" must be given the meaning it has under English law, unless the context otherwise requires.

Apart from authority, I should have thought this rule 3 tax was a tax on investment income. It is not, of course, a tax on specific investments but it is a tax on a proportion of the world investment income, and that is surely a tax on investment income and not on business profits. In so holding, I should be in good company, for Rowlatt J. so regarded it in *Equitable Life Assurance Society of the United States* v. *Hills*.[12] So did Dixon C.J., Fullagar and Menzies JJ. in *Mutual Life and Citizens' Association* v. *Federal Commission of Taxation*,[13] who all took the view that "If you impose a tax on 10 per cent. of an amount which "includes several items, you are imposing a tax on every item "which is included in that amount."

But it is said that there is a decision of this House to the effect that it is not a tax on investment income but is a tax on the profits of the business. That decision is *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*.[14] I would draw the attention of your Lordships to the most unusual course which that case took. The question was how the tax under rule 3 was to be calculated when some of the investments of the society were in United Kingdom War Loan Stock which

[12] 8 T.C. 657.

[13] (1959) 33 Aust.L.J.R. 54, 56.

[14] [1947] A.C. 605.

was exempted from any tax at all. Both parties—both the Crown and the society—proceeded on the footing that the tax under rule 3 was a tax on investment income and that the society must be given the benefit of this exemption. The parties differed only as to the way in which the benefit should be calculated. The method adopted by the Crown commended itself to the court of first instance. The method adopted by the society commended itself to the Court of Appeal. But when the case reached this House, a new point was raised for the first time by the House itself. It was suggested that the tax under rule 3 was not a tax on investment income at all but a tax on profits, and accordingly that the society was not entitled to any benefit at all from the exempted investments and could make no deduction at all on that account. Neither party liked the point at all. The Crown (in whose favour it appeared to be) refused to take it. The Solicitor-General (Sir Frank Soskice Q.C.) said[15]: "It is not "proposed to address the House on the question whether the "wording of rule 3 is such as not to permit any deduction at all. "The Crown does not, in any event, seek an order putting the "respondents in a worse position than the order of the court of "first instance." In spite of the Crown's reluctance, the House was so convinced of the correctness of the point, which it had itself raised, that it decided that the society was not entitled to any exemption at all. The House did not, however, carry its point of view so far as to compel the Crown to accept an order it did not ask for. The House simply reversed the decision of the Court of Appeal and restored the judgment of the court of first instance.

Looking back on it now, with all the knowledge since acquired, it does seem a pity that the House insisted on its own point so strongly, for it has been turned to great advantage by the mutual societies as against the Crown. It recently compelled the High Court of Australia to decide a case contrary to its own better judgment: see *Mutual Life and Citizens' Association* v. *Federal Commission of Taxation*.[16] It compelled the judges below in the present case to decide it as they did, and Parker L.J. went so far as to say[17] that he was unable "fully to understand" the decision of the House.

And, as it happened, no doubt owing to the unusual course which was adopted, the House in 1947 was never referred to a

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[15] [1947] A.C. 605, 616.

[16] 33 Aust.L.J.R. 54.

[17] [1959] Ch. 427, 441; [1958] 3 W.L.R. 354, 364.

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very relevant decision of its own. It was never referred to the decision in *New York Life Insurance Co.* v. *Styles*,[18] which holds that a mutual life assurance society does not make profits. That case is quite inconsistent with the notion that the tax under rule 3 is truly a tax on "profits" as that word is used in English law. At most it is a tax on a calculated figure that is "deemed to be "profits" though not so in fact. It is to be treated "as being "income," that is, as if it were income derived from the business, though not so in fact.

My Lords, I ask myself, What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under rule 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is what I would ask your Lordships to do. I would invite your Lordships to say that the decision of this House in 1947 has no application to the meaning of the word "profits" in the Double Taxation Agreement. The tax under rule 3 is not a tax on the profits of the business within the meaning of that agreement but is rather a tax on income in the form of dividends and interest.

Just consider what would be the result of applying the 1947 decision here. If the society does make "profits" from its business, the Double Taxation Agreement says that it is to be taxed here, as if it were completely independent of the Australian head office and were dealing at arm's length with it. But, on this hypothesis, what is the result? If this society were here completely independent, then, being a mutual society, it would not make any profits so as to be chargeable under Case I, and furthermore, being established in this country, it would not be liable to tax under rule 3 at all, because that tax does not apply to independent establishments here. So the establishment here would not be liable to tax on profits at all. This cannot have been intended. It is quite contrary to the tenor of the Double Taxation Agreement which assumes that, if the society does

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[18] 14 App.Cas. 381.

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make profits, some of those profits would be attributable to its establishment in the United Kingdom.

The true answer, to my mind, is that the society does not make any "profits" from its business within the meaning of the Double Taxation Agreement. But it has a world "investment income," and it can be taxed here under rule 3 upon a proportion of that income, and when it comes to pay Australian tax in Australia (on its world investment income) it will receive credit for the amount paid here under rule 3. If I am wrong, it means that the Australian society will no longer have to pay the tax it has paid under rule 3 for 30 years or more. It will have to pay no tax at all in return for the benefit of carrying on the business of life assurance in this country—but only tax on such investments as it may choose at its will to retain in this country. I do not think that this was the intention of the Double Taxation Relief Agreement between the United Kingdom and Australia.

I would therefore allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Bell, Brodrick & Gray.*

J. A. G.

[HOUSE OF LORDS.]

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Nov. 11, 12, 16, 17, 18, 19;
Dec. 14.

BELFAST CORPORATION . . . . APPELLANTS;

AND

O. D. CARS LTD. . . . . . . RESPONDENTS.

Northern Ireland — Statute — Validity — "Take any property without "compensation"—Meaning of "take"—Meaning of "property"—Town and country planning restrictions on development—Injurious affection—Claim for compensation—Statutory provision excluding compensation—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 5 (1)—*Ministries of Northern Ireland Act (Northern Ireland)*, 1921 (12 *Geo.* 5, *c.* 6), *s.* 3 (1)—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5, *c.* 12), *s.* 10 (2)—*Planning (Interim Development) Act (Northern Ireland)*, 1944 (7 & 8 *Geo.* 6, *c.* 3), *s.* 6 (4).

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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Conflict of Laws—Confiscatory or political legislation—Town and country planning restrictions—Whether confiscatory—" Take . . . property " without compensation "—Validity of Act of Northern Ireland.

Evidence—Minister, by—Certificate—Whether Ministry considers restriction reasonable — Appropriate evidence — Ministries of Northern Ireland Act (Northern Ireland), 1921, *s.* 3 (1).

Town and Country Planning—Restrictions on development—Whether confiscatory.

By section 5 (1) of the Government of Ireland Act, 1920: " In " the exercise of their power to make laws neither the Parliament " of Southern Ireland nor the Parliament of Northern Ireland shall " make a law so as either directly or indirectly to establish or endow " any religion, or prohibit or restrict the free exercise thereof, or " give a preference, privilege, or advantage, or impose any disability " or disadvantage, on account of religious belief . . . or divert from " any religious denomination the fabric of cathedral churches, or, " except for the purpose of roads, railways, lighting, water or " drainage works, or other works of public utility upon payment " of compensation, any other property, or take any property without " compensation."

By section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931: "Property shall not be deemed to be injuriously " affected by reason of the coming into operation of any provisions " inserted in a planning scheme, which prescribe the space about " buildings or limit the number of buildings to be erected, or pre- " scribe the height or character or user of buildings . . . and which " the Ministry, having regard to the nature and situation of the " land affected by the provisions, considers reasonable for the " purpose. . . ."

By section 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944: " Where (*a*) an interim development " application is refused . . . then, the applicant . . . shall, if he " makes a claim for the purpose be entitled to obtain from the " local authority such compensation in respect of any injurious " affection of his property . . . as he would be entitled to obtain " under the [Act of 1931] if such injurious affection had been " suffered as a consequence of the coming into operation of a " planning scheme . . . "

A local authority in Northern Ireland refused an interim development application under section 2 of the Act of 1944 made by a company for permission to erect factories and shops on its land. The ground of the refusal was that the height and character of the proposed buildings would not be in accordance with the requirements of the site, which was zoned as residential. Consequently, the company claimed compensation for injurious affection:—

Held, (1) that section 6 (4) of the Act of 1944 incorporated section 10 (2) of the Act of 1931 (post, p. 516); (2) that the words " take any property without compensation " in section 5 (1) of the Act of 1920 were not confined to the property of religious bodies, and also that they were governed by the words "either directly or indirectly"; (3) that the rights which in the aggregate constituted ownership of property could not themselves be called "property," and so the right to use property in a particular way was not itself property; accordingly, the restrictions imposed by these Planning Acts could not be described as a purported authorisation to "take "any property without compensation" in contravention of section 5 (2) of the Act of 1920 (post, pp. 517, 525); (4) that, therefore, the company was not entitled to compensation.

Held, further, that, in order to satisfy the requirements of section 10 (2) of the Act of 1931 as to proof that the Ministry considered that the restrictions imposed were reasonable, a certificate shall be issued under the Minister's seal and duly authenticated; such a certificate, when tendered, would prove itself under section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921. It was not satisfactory that oral evidence should be given by an official speaking merely on instructions without having any personal knowledge of the matter (post, pp. 522, 527).

Decision of the Court of Appeal in Northern Ireland reversed.

APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J. and Black L.J.).

This was an appeal from an order of the Court of Appeal in Northern Ireland dated March 26, 1959, whereby the court allowed the appeal of the respondent company, O. D. Cars Ltd., from the order of the High Court of Justice in Northern Ireland, Queen's Bench Division, filed on June 26, 1957, and made on the hearing of a case stated by an arbitrator pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919, wherein the present respondents were claimants and the present appellants, the Belfast Corporation, were the respondents.

The facts, stated by Viscount Simonds, were as follows: The respondents, a limited company registered in Belfast, owned in fee farm certain land at Alexandra Park, Belfast. On buildings erected on that land they had for many years carried on the business of garage proprietors and general motor engineers. On February 9, 1954, they made an application to the appellants, the Belfast Corporation, for permission to erect on the land further industrial and commercial premises, namely, lock-up shops on Antrim Road and factories or warehouses on the back portion. The application was made pursuant to the provisions of section 2 of the Planning (Interim Development) Act (Northern Ireland), 1944, to the appellants as the interim development authority. Such an application was known as an interim development application.

On March 2, 1954, the appellants refused the application on the grounds (a) as to the lock-up shops, that the height and character of the proposed development would not be in accordance with their requirements for the site, namely, development to be in shops with dwellings over, minimum height 25 feet, and (b) as to the industrial or commercial use of the remainder of the site, that the site was zoned as residential and that the character and user of the proposed development would be incompatible with such zoning.

This refusal led to a claim for compensation for injurious affection under the Act which, in accordance with its provisions, was referred to the official arbitrator appointed thereunder. The relevant statutory provisions were contained in the Planning and Housing Act (Northern Ireland), 1931, and the Planning (Interim Development) Act (Northern Ireland), 1944, hereafter called the 1931 Act and the 1944 Act. The former Act, after providing for the making of planning schemes to be prepared and adopted by local authorities, and to be approved by the Minister, and sundry other relevant matters, by section 9 enacted that any person whose property was injuriously affected by the coming into operation of a planning scheme should, if he made a claim for the purpose within the time therein mentioned, be entitled to obtain compensation in respect thereof from the responsible authority. But that right was subject to the limitation contained in section 10, which provided by subsection (1) that where property was alleged to be injuriously affected by reason of any provisions contained in a planning scheme, no compensation should be paid in respect thereof if or so far as the provisions were also contained in any public, general or local Act in force in the area or otherwise as therein mentioned, and by subsection (2), which was the subsection relevant to this appeal, as follows: " Property shall " not be deemed to be injuriously affected by reason of the coming " into operation of any provisions inserted in a planning scheme, " which prescribe the space about buildings or limit the number " of buildings to be erected, or prescribe the height or character " or user of buildings . . . and which the Ministry, having regard " to the nature and situation of the land affected by the provi- " sions, considers reasonable for the purpose. . . ."

Development under the Act of 1931 made slow progress and was in due course supplemented by the Act of 1944. Section 1 (1) of that Act deemed all land which was not the subject of a planning scheme under the earlier Act, or of a resolution to prepare and adopt such a scheme to be subject to a resolution to prepare a planning scheme under the Act. Section 2 directed the Ministry to make a general interim development order with respect to land to which such a resolution applied, and provided that such an order might empower any local authority specified therein to permit the development of land in accordance with the provisions thereof. In accordance with the duty thus placed upon it, the Ministry, on July 10, 1944, made the Planning (General Interim Development) Order (Northern Ireland), 1944 (S.R. & O. 1944, No. 58), which empowered the appellants to grant permission for the development of land within the county borough of Belfast. Under section 6 (4) of the Act of 1944 the respondents made the claim for compensation now under review. That subsection provided, so far as material: " Where (*a*) an " interim development application is refused . . . then, the " applicant . . . shall, if he makes a claim for the purpose, be " entitled to obtain from the local authority such compensation " in respect of any injurious affection of his property . . . as he " would be entitled to obtain under the [Act of 1931] if such " injurious affection had been suffered as a consequence of the " coming into operation of a planning scheme . . ."

The claim for compensation having been made and refused upon the grounds already stated, a number of questions were raised before the arbitrator which led him, without proceeding to an award, to state a consultative case for the opinion of the court in which he posed two questions as follows: " (1) Whether I am " entitled to award compensation to the claimant for injurious " affection of the said land. (2) Whether the evidence of Mr. " A. P. Fitzgerald is sufficient to satisfy the requirements of " section 10 (2) of the Planning and Housing Act (Northern " Ireland), 1931."

The relevant facts relating to the second question were that a Mr. Ronald Green, assistant secretary to the Ministry of Health and Local Government, by letter of January 3, 1955, told the solicitor of the appellants that Mr. A. P. Fitzgerald would attend the hearing of the claim before the arbitrator and would be prepared to state that " the decision on the application of O. D. " Cars Ltd. made by the corporation . . . was reasonable and " was based on considerations which, if included in a scheme " formulated under the above-mentioned Acts, would be approved " by the Ministry."

Mr. Fitzgerald duly attended the hearing. He proved that he was authorised by the Ministry to give evidence on its behalf.

that he had no personal knowledge of the facts of the case, that he was not present at discussions which he said had taken place at the Ministry with regard to the matter, but that he was authorised by the Ministry to state and did state that as a result of such discussions the Ministry considered that the decision of the appellants on the application of the respondents was reasonable, and was based on considerations which, if included in a scheme formulated under the relevant Acts, would be approved by the Ministry.

F. A. L. Harrison Q.C. and *Maurice Gibson Q.C.* (both of the Bar of Northern Ireland) and *James McQuitty* (of the English Bar and the Bar of Northern Ireland) for the appellant corporation. In the Court of Appeal Lord MacDermott C.J. rightly formulated the four questions to be considered: " (1) On its true " construction does section 6 (4) of the Act of 1944 incorporate " a reference to section 10 (2) of the Act of 1931 as well as to " the compensatory provisions of section 9 of that Act? (2) If " so, does section 10 (2)—assuming (A) the fulfilment of its " conditions, and (B) its validity as an enactment—defeat the " appellants' claim for compensation? (3) If the answer to (2) " is 'Yes,' are the conditions of section 10 (2) fulfilled? (4) If " the answer to (2) is 'Yes,' is section 10 (2) a valid enactment " having regard to the provisions of section 5 of the Government " of Ireland Act, 1920."

On question (1) the appellants agree with the reasoning of Lord MacDermott. In the context of the Acts entitlement to compensation for injurious affection is the same whether or not the claim arises from the refusal of an interim development application or as a result of the operation of a perfected planning scheme. As to question (2), the appellants are not now concerned with it. As to question (3), it is agreed that the height, character and user of the buildings were prescribed, but Lord MacDermott was wrong in rejecting the evidence of Mr. Fitzgerald; his evidence satisfied the condition of section 10 (2) as expressed in the words " which the Ministry . . . considers reasonable for the " purpose." As to question (4), the constitutional question, it cannot be accepted that the imposition of a restriction on the use of property in the hands of its owner can amount to a taking within section 5 (1) of the Act of 1920. On the state of the law in 1920 compensation was unknown in Ireland for such a restriction. The legislative intent can be discovered by reference to what was eligible for compensation in 1920 at common law or by statute. Further, section 5 (1) in the context of the Act extends only to the acquisition of property without compensation. The prohibition in the section does not extend beyond a very limited class of "property." In 1920 "property" could have been the subject-matter of compensation but not rights in property—the right to use property in a particular way. If that is right, it is conclusive of this appeal. But, even if the taking of property within section 5 (2) of the Act of 1920 extends to prohibitions relating to the use of property, the Planning Acts are regulatory and the discretion vested in the Ministry by section 10 (2) of the Act of 1931 is reasonably framed so as to accomplish the objects of the Act. The jurisdiction of the court to determine the validity of Northern Irish legislation is not ousted by the power so vested in the Ministry to declare the reasonableness of the provisions of a planning scheme. Even if section 10 (2) has the effect of vesting in the Ministry the power of determining whether property may be taken without compensation to the exclusion of the court's jurisdiction, it is by virtue of the words "which the Ministry . . . considers reasonable for the purpose," and these words are severable from the rest of the subsection, so that they alone are void as being ultra vires the Parliament of Northern Ireland. Having regard to the pith and substance of section 10 (2), it is not ultra vires the Act of 1920.

As to question (1), the only right a person, whose interim planning application has been refused, has to recover compensation for injurious affection of the property is conferred by section 6 (4) of the Act of 1944, a right to such compensation as he would have been entitled to under the Act of 1931 if injurious affection had been suffered in consequence of the coming into operation of a planning scheme. Section 10 (2) of the Act of 1931 excludes from the category of injurious affection loss sustained by reason of the coming into operation of any provision in a planning scheme which prescribes the height, character or user of buildings and which the Ministry considers reasonable for the purpose. The refusal of the interim planning application did prescribe the height, character and user of the buildings to be erected, and if the damage had been suffered as a result of the coming into operation of a planning scheme, the first condition of section 10 (2) would have been satisfied. See sections 1, 2 (1), 4, 5 (2), 6, 7, 8, 9, 10 (1), 44, 45 (1) and 46 of the Act of 1931, the objects of which were to be achieved by the provisions of a scheme.

At the time of this Act there was no compensation in respect of restrictions on the height or character of buildings: see section 59 (2) of the Housing, Town Planning, etc., Act, 1909. That Act only dealt with land in the course of development or likely to be developed: see sections 54 (1), 55 (2) and 58 (1), the last one being the parent of section 9 (1) in the Act of 1931. The Act of 1909 never applied to Ireland, though there was power to apply it.

The "purpose" referred to in section 10 (2) of the Act of 1931 is the purpose of the provisions of a planning scheme.

The Planning Schemes (Procedure) Regulations, 1945 (Northern Ireland) (S.R. & O. (N.I.), 1945, No. 110), show that before the stage of section 10 (2) is reached the Ministry has considered the provisions of the scheme in their general context, and by the time the Ministry approves a scheme it has at every stage been concerned with hearing the objections of persons affected: see regulations 3, 4 (3), 5, 8, 12 (2), 17, 19. The Ministry must have regard to the statutory matters prescribed. It is not an arbitrary discretion which is confided to the Ministry, which must have regard to the nature and situation of the land affected. Within the statutory limits the Ministry is made judge of what is reasonable. The responsibility of framing schemes to suit the public needs is with the Ministry, which must determine whether the prohibitions on the use of property are proper to the carrying out of the Act. *Fawcett Properties Ltd.* v. *Buckingham County Council*[1] shows in the context of the English planning legislation that the words "such conditions as they think fit" (in section 14 (1) of the Town and Country Planning Act, 1947), mean "having regard to their statutory duties and to local planning "considerations." See also sections 2 (6) (10), 3 (1), 4, 5 (1), 6, 9 and 10 (2) of the Act of 1944. "Injurious affection" has the same meaning in both the Act of 1931 and the Act of 1944. Under the Act of 1944, by section 6 (4), an applicant is entitled to "such compensation . . . as he would be entitled to "obtain under the principal Act if such injurious affection had "been suffered as a consequence of the coming into operation "of a planning scheme." The error of the respondents is to equate "injurious affection" with damage or loss. By virtue of section 6 (4) of the Act of 1944 a question of entitlement to compensation is to be determined as in the case of a claim under section 9 (1) of the Act of 1931. Section 9 (4) contains the provisions for arbitration. In section 6 (7) of the Act of 1944 there is specific reference to section 10 of the Act of 1931, applying thereby section 10 (2) to interim planning. But if the respondents were right the absence of a scheme would bar a claim.

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[1] [1959] Ch. 543; [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521.

As to whether the evidence here was sufficient to satisfy section 10 (2), see section 3 of the Ministries of Northern Ireland Act (Northern Ireland), 1921. The relevant Ministry is now the Ministry of Health and Local Government: see section 1 of the Ministries Act (Northern Ireland), 1944. The evidence of Mr. Fitzgerald was sufficient as to what the Ministry considered reasonable "having regard to the nature and situation of the "land affected." There was in evidence a map which showed the nature and situation of the land, and the reasons given for the refusal of the application showed the relation of the particular to the general.

As to the final question relating to the Government of Ireland Act, 1920, that Act, by section 76 (2), repealed the Government of Ireland Act, 1914. In the Act of 1914 the corresponding section to section 5 (1) of the Act of 1920 is section 3, which does not contain the words "or take any property without compensation." To "take" property means to acquire property. The design was to provide a constitution for both Southern Ireland and Northern Ireland and to continue existing laws. The method was to confer legislative powers on their legislatures in the widest terms, while indicating certain prohibited matters: see sections 4, 5, 61, 64 and 65. There is no general declaration of fundamental rights, free speech, assembly, religion, though these are found in articles 6 to 9 of the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922. The Constitution of Northern Ireland is sui generis and unlike any other constitution, either that of Eire or of any of the Dominions.

The meaning of the relevant phrase in section 5 (1) of the Act of 1920 "or take any property without compensation" should be confined to that which it would have borne in 1920.

As to the construction of Dominion constitutions, see *Croft* v. *Dunphy*[2] and *Edwards* v. *Attorney-General for Canada*.[3]

If by-laws are reasonable they are valid, even if they seriously restrict the user of property without compensation: see *Slattery* v. *Naylor*.[4] The Irish Free State (Agreement) Act, 1922, the

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[2] [1933] A.C. 156 (P.C.); 48 T.L.R. 652.

[3] [1930] A.C. 124, 136–137 (P.C.); 46 T.L.R. 4.

[4] (1888) 13 App.Cas. 446, 449 (P.C.); 4 T.L.R. 426.

Irish Free State Constitution Act, 1922, and the Irish Free State (Consequential Provisions) Act, 1922, followed upon the Treaty of 1921. By the last Act the Government of Ireland Act, 1920, was confirmed in relation to Northern Ireland. If the effect of the inclusion of the words "or take any property without compensation" means that a vast sphere of regulatory legislation is to be closed, it would be extraordinary to find such a result achieved by so slight an enactment.

The report of the Committee on Compensation and Betterment (1942, Cmd. 6386) indicates in paragraphs 32 et seq. the trend of legislation in relation to compensation.

At common law, where there was no surrender of land or property to the State, no taking over of the property or putting it at the disposal of the State, no actionable injury and no right to compensation arose. There was no compensation where the land was not taken or physically invaded. So there was no compensation for the sort of interference complained of in the present case. "Injurious affection" has never had the meaning for which the respondents contend. The principles relevant to the right to compensation were stated in *Caledonian Railway Co.* v. *Walter's Trustees.*[5] See also the compensation provisions in sections 1, 9, 18 and 49 of the Lands Clauses Consolidation Act, 1845. There is a contrast between the situation as regards injurious affection when lands are taken and when they are not taken. At the time of the Act of 1920 compensatable matter did not go beyond compulsory acquisition of land or its physical invasion or injurious affection in the very limited sense in which it was understood under the Act of 1845. That was the right to compensation which was carried into the new Constitution of Northern Ireland. The field of legislation would be unlikely to be restricted in the way suggested by the respondents. In sections 3 and 42 of the Government of Ireland Act, 1914, no distinction appears to be drawn between the expressions "divert" and "take" in the conceptions which they express. The essence of "injurious affection" is that a man is left with his property, though diminished in value. "Indirect" taking cannot have a different effect from "direct" taking; the final result must be a transfer. The court is not concerned with indirect consequences. To "take" must mean to "acquire," and that indicates the meaning of the expression "directly or "indirectly." What cannot be lawfully accomplished by direct means cannot lawfully be accomplished by indirect means, and that principle is reflected in the words of section 5 of the Act of 1920 which recognise it and add nothing beyond indicating that the Act is not to be circumscribed. In the Act of 1914 the word " property " was used only in the sense of what can be taken for public utility purposes. It is not used as equivalent to the right of ownership and it is not to be given a different or wider meaning here. If " property " means a bundle of rights, each individual element in that bundle is not " property," a word which only applies to the aggregation of rights. Further, these words may refer simply to the property of religious denominations.

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[5] (1882) 7 App.Cas. 259, 276 (H.L.).

If the appellants' argument is right so far, the true decision of this case is confined to determining the meaning of the words " take any property." The appellants' construction would give the legislature comparative freedom and would preserve the subject from loss, giving " property " the meaning submitted, that is, the general sense, so that it refers to the object of ownership and is not the equivalent of property in an object or the right of ownership to it. The Act of 1920 stabilised the position as it existed at that date.

On the question whether the words in section 5 (1) are confined to the property of religious bodies, *O'Neill* v. *Northern Ireland Road Transport Board* [6] was wrongly decided.

On the meaning of " taking," the appellants rely on *Northern Ireland Transport Board* v. *Benson.*[7] *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[8] proceeds on a wrong basis as to the meaning of " taking."

Maurice Gibson Q.C. following. Even if the House rejects the contention that the taking of property means only the acquisition of property, so that it is held that to " take " is wider than to " acquire," it will yet fall short of mere interference with the property. Whatever meaning be placed on the words " take " property without compensation," they cannot, if the Act is to work at all, be given an unlimited meaning. Thus the imposition of a fine is a taking of property, and so is taxation, such as estate duty. One must put some limitation on this phrase in so far as it is contained in a prohibition which involves the conception that the property referred to is property for which compensation should be paid if it is taken. The dividing line is that which lies between regulation and confiscation.

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[6] [1938] N.I. 104, 115–116.

[7] [1940] N.I. 133, 145–147, 155–156, 170.

[8] [1953] N.I. 79, 113–114, 116, 117, 121, 126.

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BELFAST CORPN. v. O. D. CARS LTD.

Life in an organised polity involves social habits and men who live within it must give up anti-social behaviour, either voluntarily or under compulsion through the criminal law. So, too, in the use of his property a man may be similarly restrained without compensation. Restrictions on the use of his property make a man do under compulsion what he should do voluntarily; a landlord may be prevented from overcrowding his house or forced to provide proper sanitation. The difficulty of drawing the line does not invalidate the distinction.

The principal planning Act here is the Act of 1931. Section 5 deals with the subject-matter described in section 10 (2). See also section 9 (1). The question arises whether under this regulating provision there is a liability in the particular case of this particular site to pay compensation.

In the abstract a regulating provision imposed on a landowner benefits him, too, because his neighbours are also submitting to similar restrictions, and that would call for no compensation. It is different from confiscation.

To " take " imports a specific transaction. Some other transaction, even though it may have a similar effect to the owner of the land, cannot be treated as a taking. The test is whether the Act is directed to obtaining the public good, advancing public amenity or reducing public evil, or whether, by contrast, it is really confiscatory. By " public good " is meant peace, order and good government. When an Act vests in the Ministry the discretion to determine whether or not a certain restriction should be imposed, the test is the same. Provided the discretion is defined by reference to the objects of the Act, it is valid. *Hughes and Vale Proprietary Ltd.* v. *New South Wales*[9] applies to this case. Prima facie this scheme is valid. The discretion vested in the Ministry is regulatory. The Ministry is directed what it is to consider. The function of the Ministry is entirely different from that of the courts. The function of the court is to decide whether the powers conferred on the Ministry are intra vires the Act. The function of the Ministry is to act within the vires validly conferred. Provided that the Ministry acts within the requirements of section 10 (2), it is acting within a validly delegated function and the courts have no say in the matter. The discretion vested in the Ministry is not arbitrary but must be exercised on planning principles in the public interest. Its power to declare on the reasonableness of the provisions of a planning scheme is an administrative function. There is no ouster of the jurisdiction of the courts, because the jurisdiction of the courts to adjudicate on the validity of the legislation is not excluded. Even if section 10 (2) has the effect of vesting in the Ministry the power of determining whether property may be taken without compensation to the exclusion of the courts, it is by virtue of the existence of the words "and which the Ministry, having regard to the "nature and situation of the land affected by the provisions, "considers reasonable for the purpose," and these words are severable from the rest of the subsection, so that they alone are void as being ultra vires the legislature.

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[9] [1955] A.C. 241 (P.C.); [1954] 3 W.L.R. 824; [1954] 3 All E.R. 607.

W. B. Maginess Q.C., Attorney-General for Northern Ireland, C. A. Nicholson Q.C. and *J. K. Pringle* (all of the Bar of Northern Ireland) as amici curiae. This case is important to the Government of Northern Ireland in relation to the general powers of Parliament. The decision will be applicable to many Acts of Parliament.

The question of taking property without compensation has been before the courts in Northern Ireland: see *Northern Ireland Transport Board* v. *Benson.*[10] Till now it has not been held that the "taking" of property meant more than its acquisition. If the Northern Ireland Acts were construed so widely that any interference with the rights of property must be accompanied by compensation a difficulty would be created. In *France Fenwick & Co. Ltd.* v. *The King*[11] the court distinguished between an act of direction in unloading a cargo and a mere prohibition.

Under section 4 of the Government of Ireland Act, 1920, legislative powers are given to the Parliament of Northern Ireland subject to certain limitations. So long as it keeps within its own field it is the master. Section 5 must be construed in the light of the powers given by section 4. As to the construction of such Acts, see *Edwards* v. *Attorney-General for Canada.*[12] The powers of the Northern Ireland Parliament should be construed widely so as to make it master in its own house. See the restrictions imposed by the Intoxicating Liquor Act (Northern Ireland), 1923. Such Acts are restrictive but are passed for the maintenance of peace, order and good government. See also the Agriculture Act (Northern Ireland), 1949.

To construe the word "take" in section 5 of the Act of 1920 one must look first at that section itself and then read it in conjunction with section 4. "Take" means acquisition or entering into possession or a transfer from the owner to some other person. It does not cover restricting the user of land.

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[10] [1940] N.I. 133, 156–157, 173.

[11] [1927] 1 K.B. 458; 43 T.L.R. 18.

[12] [1930] A.C. 124, 136.

If possible a construction should be given to the words which would avoid holding the legislation to be ultra vires: see *Robb* v. *Electricity Board of Northern Ireland.*[13] The "pith and "substance" of the legislation should be looked at: *Govindan Sellappah Nayar Kodakan Pillai* v. *Punchi Banda Mudanayake.*[14]

The onus is on the respondents to show that section 10 (2) of the Act of 1931 was enacted as part of a plan to take property without compensation.

In order to render such legislation ultra vires there must be an infringement of some right which, detached from the physical property, is of value and can be disposed of: see *Chiranjit Lal Chowdhury* v. *Union of India.*[15] But the right to build on one's land is not absolute at common law and is subject to the principle sic utere tuo ut alienum non laedas. Those entrusted with planning restrictions have the right to guard the good of the community, which varies from time to time and from place to place. Any person owning property must so use it as not to offend against the general good. Here the general good has been defined by the scheme, and to build in contravention of it would offend against the principle sic utere tuo ut alienum non laedas. There can be no compensation for a restriction on the use of property which prevents an owner from hurting his neighbours. *Slattery* v. *Naylor* [16] goes further than the present case: see also *Russell* v. *The Queen.*[17]

The decisions of the courts in the United States recognise the distinction which has been suggested in relation to sections 4 and 5 of the Act of 1920: see *Commonwealth* v. *Alger* [18]; *Mugler* v. *Kansas State* [19]; *Transportation Co.* v. *Chicago* [20]; *Walsh* v. *Swasey* [21]; *Village of Euclid* v. *Ambler Realty Co.*[22] and *United States* v. *Causby.*[23]

The expression "take" was used in Acts of Parliament long before 1920: see the Lands Clauses Consolidation Act, 1845. The expression "injurious affection" was also used. "Take" means "acquire." "Injurious affection" means that there was no acquisition but that the lands were affected.

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[13] [1937] N.I. 103, 125.

[14] [1953] A.C. 514, 520 (P.C.); [1953] 2 W.L.R. 1142.

[15] [1950] S.C.R.(India) 869.

[16] 13 App.Cas. 446, 449.

[17] (1882) 7 App.Cas. 829 (P.C.).

[18] (1851) 7 Cush. 53, 84–85.

[19] (1887) 123 U.S. 623, 666–667.

[20] (1829) 99 U.S. 635, 639–640.

[21] (1908) 214 U.S. 91.

[22] (1920) 272 U.S. 365.

[23] (1946) 328 U.S. 256, 258.

The test should be: Are the restrictions imposed clearly arbitrary and unreasonable? Here they are not.

C. A. Nicholson Q.C. following. The conclusion of Lord MacDermott C.J. in the Court of Appeal rested largely on his reading of the American cases. But the Fifth Amendment of the United States Constitution and the Fourteenth Amendment have produced two lines of cases. The former provided that "private property" shall not "be taken for public use without "just compensation," and the first line of cases, dealing with the meaning of the word "taken," ended with *United States* v. *Causby*.[24] The latter forbade the State to "deprive any person "of life, liberty, or property, without due process of law." The *Causby*[25] line of cases might be relied on in connection with section 5 of the Act of 1920, but the other line of cases is dealing with the question whether a particular person has been deprived of his property without due process of law: see *Pennsylvania Coal Co.* v. *Mahon*.[26]

Section 51 (xxxi) of the Constitution of the Commonwealth of Australia empowers Parliament to make laws for the peace, order and good government of the Commonwealth with respect to "the acquisition of property on just terms." It is part of the enabling provisions and they should be given a benevolent construction, while in the case of a restricting provision the approach should be the reverse.

The word "take" in section 5 of the Act of 1920 is more closely related to the use of the verb in the Fifth Amendment than to the Australian provision.

As to the Australian authorities, see Wynes on Legislation and Executive Powers in Australia, 2nd ed., p. 463, and *Minister of State for the Army* v. *Dalziel*.[27] That case does not go the whole length of establishing that a mere right of enjoyment in property (such as a man's right to build his house 10 feet higher) is such a right as the respondents contend. Mere enjoyments are not property in this context. See also *Bank of New South Wales* v. *The Commonwealth*[28] and *Australasian United Steam Navigation Co. Ltd.* v. *Shipping Control Board*.[29]

It is impossible that "take" in section 5 of the Act of 1920 should mean anything but "appropriate" or "acquire." A single formula could not cover a case of this sort, and it would be extraordinary if the phrase in the Act were used to apply to all cases of restriction. When a Parliament was set up with the wide words used in section 4 such an intention could not have been present.

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[24] 328 U.S. 256, 264–265, 269.

[25] 328 U.S. 256.

[26] (1922) 260 U.S. 393, 412, 415.

[27] (1944) 68 C.L.R. 261, 283–284, 290.

[28] (1948) 76 C.L.R. 1, 348–350.

[29] (1945) 71 C.L.R. 508, 524–526.

In Canada a conflict arose between the powers of the Federal Parliament to make laws conferred by section 91 of the British North America Act, 1867, and the exclusive powers of the provincial legislatures; the solution was found in the test of the "pith "and substance" of the enactment: see *Gallagher* v. *Lynn.*[30]

If the alleged taking, whether it be by way of appropriation or restriction, be for some good reason connected with the property, it is not a "taking" within section 5 (1) of the Act of 1920, which imports a naked taking—a taking for taking's sake.

All difficulty is avoided if "take" is construed as meaning "acquire" in contrast to "injurious affection" in compensation law. The acceptance of a wider meaning comparable to "deprive" in the Fourteenth Amendment raises the conflict with the power to make laws for peace, order and good government and opens the door to something very like censorship of legislation, a thing foreign to all the ideas which have hitherto prevailed both with regard to our own laws and with regard to those of the great Dominions: see *Riel* v. *The Queen.*[31]

The well-known principle that an Act is not to be read as denying compensation to a subject whose property has been interfered with has never been held to apply to restrictions imposed by regulatory legislation and is applicable only in cases of expropriation or physical interference which would otherwise give rise to an actionable wrong. The phrase "take away pro- "perty without compensation" should be read as co-extensive with this principle.

Central Control Board (Liquor Traffic) v. *Cannon Brewery Co. Ltd.*[32] and *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[33] deal with expropriation. See also *Newcastle Breweries Ltd.* v. *The King*[34] and *In re an Arbitration between Ellis and Ruislip-Northwood Urban District Council.*[35] A mere negative prohibition does not come within this sphere: *France Fenwick &*

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[30] [1937] A.C. 863, 870 (H.L.); 53 T.L.R. 929; [1937] 3 All E.R. 598.

[31] (1885) 10 App.Cas. 675 (P.C.).

[32] [1919] A.C. 744, 752, 754, 760, 763 (H.L.); 35 T.L.R. 552.

[33] [1920] A.C. 508, 528–529, 568, 579 (H.L.); 36 T.L.R. 600.

[34] [1920] 1 K.B. 854, 866; 36 T.L.R. 276.

[35] [1920] 1 K.B. 343 (C.A.); 35 T.L.R. 673.

Co. Ltd. v. *The King*.[36] Everyone suffers some restrictions in the use of his property and it is held subject to the general law.

In *O'Neill* v. *Northern Ireland Road Transport Board*[37] it was held that since in section 64 (1) of the Act of 1920, affording protection to the universities in language similar to that of section 5 (1), the words "or take any property without compensation" were not used, these words in section 5 (1) were intended to have a wider application and to produce an additional meaning. But if "take" means "acquire," the words give no greater protection than the words which precede them. In both sections the taking of property refers to the taking of property by compulsory acquisition.

As to questions of degree, see *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales*.[38] In such cases the question is as to the true nature and character of the legislation and whether or not it is confiscatory: see *Gallagher* v. *Lynn*.[39] In some cases where there is a certain element of sacrifice by a citizen of his property in the public weal compensation may put him back where he was. But where the Act is regulatory, and there is at least a degree of sacrifice that the citizen should make, that is not truly compensatable.

The phrase to be construed here is a composite one and is not to be elucidated by taking it to pieces: *Vitkovice Horni a Hutni Tezirstvo* v. *Korner*.[40]

W. F. Patton Q.C., *R. L. E. Lowry Q.C.* and *R. W. B. McConnell* (all of the Bar of Northern Ireland) for the respondent company. Two questions arise for the decision of the House on the construction of two separate sections in two separate Acts of Parliament. The mode of construction is well known in law. There is no need to apply the particular methods of construction alleged to be appropriate to the construction of constitutional Acts.

Section 5 of the Act of 1920 is not unique in constitutional Acts. The Parliament at Westminster has overriding powers over Northern Ireland, and the powers of the Parliament of Northern Ireland are superimposed in respect of the subjects mentioned in section 4, but the Westminster Parliament could legislate on the same subjects. If anything cannot be done in Northern Ireland, it can be done at Westminster: see section 2 (1) and (2) of the Northern Ireland Act, 1947.

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[36] [1927] 1 K.B. 458.

[37] [1938] N.I. 104, 116.

[38] [1955] A.C. 241, 290, 293 (P.C.).

[39] [1937] A.C. 863, 870.

[40] [1951] A.C. 869, 883; [1951] 2 T.L.R. 188; [1951] 2 All E.R. 334.

The words used here are as strong as those in the Australian Constitution and reliance is placed on the judgment in *Minister of State for the Army* v. *Dalziel.*[41] The respondents rest their case on it. The words "the acquisition of property on just "terms" in section 51 (xxxi) of the Australian Constitution are very similar to those in the relevant Act, where the words are just as strong. On the judgment in the Australian case the respondents must succeed. It recognises that property includes jus in re aliena, for example, a right of way over A's land, and taking such a right of way from a man is taking his property. When a local authority takes property by a vesting order, the property vests in it free of all charges, rights of way and other burdens, and if X has a right of way over such land and the right of way disappears so that X has lost it, that is a taking of property. The Australian case recognises that the right of occupation and user of land is property and that property can be something less than the whole bundle of rights connected with the physical entity.

If an Act creates the opportunity for a person who exercises a power to go wrong, that Act is bad. One does not have to wait until someone actually goes wrong in its exercise. It is the creation of the power and not its exercise which is the subject of objection: see *Ottawa Separate Schools Trustees* v. *Mackell.*[42]

The words of section 5 (1) of the Act of 1920 are not confined to the property of religious bodies: see *O'Neill* v. *Northern Ireland Road Transport Board.*[43] As to the meaning of "taking," *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[44] proceeds on the right basis and is relied on. The words "or take "any property without compensation" found in section 5 (1) of the Act of 1920, but not in section 3 (the corresponding section) in the Government of Ireland Act, 1914, must be given some meaning. The property taken is not confined to tangible property but may include such property as goodwill: see Williams on Real Property, 25th ed., pp. 3–4, and *Gough's Garages Ltd.* v. *Pugsley.*[45] In this case the right to build on the land is something which could have been sold.

In the phrase "take any property without compensation" the word "property" does not include money, for to give compensation for taking money would merely be to give back what had been taken, and therefore the phrase, so interpreted, would amount to a prohibition from taking: see section 16 of the Government of Ireland Act, 1920, dealing with taxation. Parliament can clearly impose fines or taxation. Thus, "property" means proprietary rights other than money.

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[41] 68 C.L.R. 261, 272, 277–278, 279, 280, 281, 282, 286, 290, 293–294, 295, 301, 309.

[42] [1917] A.C. 76, 81 (P.C.); 33 T.L.R. 41.

[43] [1938] N.I. 104.

[44] [1953] N.I. 79.

[45] [1930] 1 K.B. 615, 620–621 (C.A); 46 T.L.R. 283.

Section 5 (1) begins: "In the exercise of their power to make "laws . . ." The appellants have read the subsection as though it prohibited the doing of certain acts, whereas it prohibits the passing of certain laws. The question to be asked is what could be done under those laws. If the prohibition in the subsection is transgressed, the law is void. The kind of laws which are prohibited are laws which would have an effect "so as to" produce certain effects. The words indicate the effect of the laws and not the intentions of the persons making them. The word "take" has an extremely wide meaning. It is a verb with many uses, e.g., "take a drink," "take a seat" and "take a "train." One can look at taking either from the point of view of the recipient or from that of the person who loses the thing taken. In this subsection "take" might either mean "take "from" or "acquire." But the latter meaning would not fit in with the grammar and sense of what has gone before. Parliament cannot acquire things. It is not a body corporate. It can only pass laws. The Crown or a Ministry can acquire property, but not Parliament. The word "take" must be looked at from the point of view of the "takee." Here it must mean "take "from." It is connected with the words "without compensa-"tion." To "take without compensation" means to "expro-"priate" or "confiscate." The words "directly or indirectly" mean "directly or obliquely," not simply directly or by an agent.

It was argued on the authority of the *Pillai* case[46] that the "pith and substance" principle must be applied in such a case as this, but if that is what the Privy Council meant, that case stands alone. It is not applicable to a section like section 5. Here the question is whether or not there is a taking. The Act challenged in the Privy Council case was on its face a good Act, but in the present case the enactment is bad because it deprives persons of property without compensation: see also *Hughes and Vale Proprietary Ltd.* v. *New South Wales.*[47] The "pith and "substance" principle is applicable to section 4 of the Act of

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[46] [1953] A.C. 514, 528–529.

[47] [1955] A.C. 241, 293, 295.

1920 but not to section 5. In the Planning and Housing Act (Northern Ireland), 1951, there would be no right to compensation but for section 9 (1). That saves the Act which, but for that section, would be bad. Section 10 (2) of that Act, which takes away the compensation given by section 9, is bad. It is not contended that any part of the Act is bad but section 10. There is a wide definition of "land" in section 12 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Parliament will not be presumed to intend to take away property without compensation. This will influence the courts in their interpretation of Acts of Parliament to the point that they will refuse to credit the legislature with such an intention unless the words used are clear and unassailable; though if Parliament expresses such an intention clearly, the courts must, of course, give effect to it. A subordinate Parliament, like that of Northern Ireland, is not to have the power to take property without compensation: see *Attorney-General* v. *Horner*[48]; *London and North Western Railway Co.* v. *Evans*[49]; *Newcastle Breweries Ltd.* v. *The King*[50]; *In re an Arbitration between Ellis and Ruislip-Northwood Urban District Council*[51] and *Bond* v. *Nottingham Corporation.*[52] The abhorrence of confiscation is such that extreme measures will be taken to avoid it. A decision in the respondents' favour might result in the invalidation of other Acts of Parliament the validity of which has been hitherto unchallenged.

In considering section 6 (4) of the Act of 1944, adequate weight was not given in the court below to the principles just stated. One is not justified in holding that it incorporated section 10 (2) of the Act of 1931. Section 6 (4) incorporated only those provisions of the Act of 1931 which related to injurious affection; it did not incorporate those provisions which related to what was not injurious affection. Section 10 (2) does not define injurious affection. In effect section 6 (4) is saying: "Make the assumption that there is injurious affection and give the compensation "which would have been given under the principal Act." To make section 10 (2) of the Act of 1931 operate, it must be assumed that a scheme exists, whereas the wording of section 6 (4) of the Act of 1944 makes the assumption that a scheme does not exist.

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[48] (1884) 14 Q.B.D. 245, 256–257 (C.A.); 1 T.L.R. 28.

[49] [1893] 1 Ch. 16, 28–29 (C.A.); 9 T.L.R. 50.

[50] [1920] 1 K.B. 854, 865–866.

[51] [1920] 1 K.B. 345, 361–362.

[52] [1939] Ch. 847, 856; 55 T.L.R. 856; [1939] 2 All E.R. 610; [1940] Ch. 429, 435 (C.A.); 56 T.L.R. 475; [1940] 2 All E.R. 12.

It is not necessary to import the provisions of section 10 (2) into a section which deals with interim development applications. The right principle to apply to the construction of section 6 (4) is that, since specific reference has been made to all the other provisions in the Act of 1931 relevant to the question of compensation in the circumstances, the omission of any reference to section 10 (2) must be taken as excluding it.

Section 10 (2) of the Act of 1931 is inappropriate to dealing with interim development. In the case of interim development there is no scheme. If section 6 (4) of the Act of 1944 was to incorporate it, one would have expected the draftsman of the Act to devise some adaptation to make its incorporation work.

Until there is in operation a planning scheme in the proper sense the Ministry cannot form or express a view as required by section 10 (2). Section 2 (3) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, prescribes the manner in which Ministries are to act. There is no justification for proof of the Ministry's views by way of hearsay evidence such as that of Mr. Fitzgerald. In the case of section 10 (2) what is envisaged is something like a certificate. Where there is no planning scheme the Ministry cannot refer to it as required by the subsection. The refusal of an application for interim development is not part of a planning scheme. If the appellants were right, the Ministry would have to certify that the refusal was reasonable for the purposes of a planning scheme which did not exist. The court must take the words of an Act of Parliament as they are and not change words which seem inappropriate: see *Brophy* v. *Attorney-General of Manitoba*.[53]

Section 6 (7) of the Act of 1944 refers to section 10 of the principal Act, which indicates that the draftsman was aware that section 10 (2) as it stood had to be altered if it was to be made to apply. The position is that it was to operate as it had previously operated, but not for the purposes of the Act of 1944. This reference to sections 9 and 10 of the Act of 1931 in section 6 (7) of the Act of 1944 does not by implication cause section 10 (2) to apply to an interim development application. There is a proviso to section 10 (2) which refers (inter alia) to "the demolition, "removal or alteration, in pursuance of a planning scheme, of "any building (*a*) existing at the date of the prescribed notice "of the passing of the resolution of the local authority to prepare "or adopt the scheme . . ." Section 6 (7) of the Act of 1944

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[53] [1895] A.C. 202, 215 (P.C.); 11 T.L.R. 198.

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was necessary to meet the situation created by section 1 (1) of that Act. A new means of defining the date for the purposes of the proviso to section 10 (2) had to be substituted for " the date " of the prescribed notice."

R. L. E. Lowry Q.C. following. The American cases cited by the Attorney-General may prove to be like dangerous animals which, once turned loose, devour their master. The use of the verb " take " in the Fifth Amendment to the United States Constitution is narrower than in section 5 of the Act of 1920; it is contrasted with the use of the verb " deprive " in the Fourteenth Amendment. In *United States* v. *General Motors Corporation*[54] the court treated the word " taken " as relating to " the right " to possess, use and dispose of " a physical thing. *Mugler* v. *Kansas State*[55] shows that the word " take " is not to be given a narrow meaning even when associated with such words as " for " the public use."

When considering " the power of the State, sometimes termed " its police power, to prescribe regulations to promote the health, " peace, morals, education and good order of the people," the test of reasonableness may be applied: see *Mugler's* case[56] and *Springer* v. *Government of the Philippine Islands*.[57] In this connection one must contrast the constitutional background of the United States and of Northern Ireland. In the former the constitution was adopted; in the latter it was imposed from without. In the former case there is a power to alter the constitution including the police powers, but not in the latter. Here reasonableness is not the final test. Reasonableness will not make valid a taking which is already forbidden: see *Slattery* v. *Naylor*.[58]

United States v. *Causby*[59] makes it clear that if most of the enjoyment of land is taken, leaving only some of its value, there is a taking for the purposes of the Fifth Amendment, although there is not an actual taking over.

Section 10 (2) of the Act of 1931 affects the property in a general sense. The right to build on one's land is property; it is one of a bundle of rights. It is also " property " in the sense of section 5 of the Act of 1920. All definitions of " property " in enactments concerned with compensation recognise a wide meaning of the expression. The ordinary principle of English law that one must not interfere with the rights of others does not draw distinctions between taking over their property and other forms of injury: see *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*[60] and *Attorney-General* v. *Horner.*[61] By 1920 there was a general notion that compensation should be paid when property was taken. To restrict the use of property in the hands of the owner is, to that extent, a taking of it in the sense of depriving him of its use; it amounts to taking away a part.

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[54] (1945) 323 U.S. 373, 377–378.

[55] 123 U.S. 623, 667–668.

[56] Ibid. 663–665.

[57] (1927) 277 U.S. 189, 209–210.

[58] 13 App.Cas. 446.

[59] 328 U.S. 256, 261–262.

When the Government of Ireland Act, 1920, was passed Ireland was going to be given two Parliaments and provision had to be made for all kinds of things which in ordinary life in England would not have to be considered. Thus section 4 was qualified by section 5 which imposed limits for the protection of individuals and which is apt to give more protection than the relevant sections in the Government of Ireland Act, 1914, and the Irish Free State (Agreement) Act, 1922. Even if the word " land " had been used at the end of section 5, that would have been enough for the respondents' purposes. If the legislature had so intended, it would have made it clear that the words " take any property " were being used in a narrow sense. There is here a conflict of ideas, but it should be resolved in favour of the wider meaning. The respondents adopt what was said as to " pith and substance " in *Northern Ireland Road Transport Board* v. *Benson.*[62]

It is admitted that, if the respondents are right, other Northern Ireland Acts may be ultra vires, but Westminster can legislate.

Section 10 (2) of the Act of 1931 creates a situation where compensation may be precluded in respect of something which is a taking away: see *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[63]; *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*[64]; *Minister of State for the Army* v. *Dalziel*[65] and *Hughes and Vale Proprietary Ltd.* v. *New South Wales.*[66] Here the appellants are claiming that the Northern Ireland Parliament can delegate to a subordinate authority the power to do something which would be wrong if that Parliament were to do it itself. A section which permits a subordinate authority to take without compensation is itself ultra vires.

Each constitution must be regarded on its own terms. *Croft* v. *Dunphy*[67] shows how different the situation may be under different constitutions. That of Northern Ireland is not the same as that of Canada or Australia. Northern Ireland may be regarded as a division in one country. The Westminster Parliament not only has a dominating role but also contains members from the subordinate territory. Against this background, types of legislation which might otherwise be reasonable are forbidden.

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[60] [1919] A.C. 744.
[61] 14 Q.B.D. 245.
[62] [1940] N.I. 133, 141.
[63] [1953] N.I. 79, 126.
[64] [1917] A.C. 76, 81.
[65] 68 C.L.R. 261.
[66] [1953] A.C. 241, 306–307.
[67] [1933] A.C. 156.

Judicial decisions have ruled against the taking of property without compensation unless the words of the Act of Parliament relied on are plain. *Dalziel's* case [68] avoids pedantic distinctions in the use of terms like " take." If there is sufficient interference with the land of another, that may virtually be a taking: see *Causby's* case.[69] From the owner's point of view a great enough interference will amount to an acquisition.

Section 10 (2) refers to provisions inserted in a planning scheme and it cannot apply unless a planning scheme exists. No planning scheme is deemed to exist, although a resolution to prepare a scheme is deemed to have been passed. While the reasons for refusal of development permission are apparently relied on by the appellants as the equivalent of provisions in a planning scheme, those reasons are nowhere deemed to be the provisions in a planning scheme. To make the subsection work, one must assume that a scheme exists, whereas the wording of section 6 (4) of the Act of 1944 clearly assumes the contrary. Sections 4 and 9 (5) of the Act of 1931 indicate that the legislature was aware of the difficulty which would arise where a planning scheme did not actually exist and had previously adopted an expedient for dealing with that difficulty. Section 4 was repealed by section 2 (10) of the Act of 1944 and no similar provision has been enacted.

It is not strange if a different result is achieved here from the result where there is a planning scheme. Objection can be made to a planning scheme by those concerned, while in the case of interim development there has never been a chance of making representations.

The evidence of Mr. Fitzgerald shows that the Ministry were not, and could not have been, considering " provisions inserted " in a planning scheme."

Further. Mr. Fitzgerald has not given the required evidence under section 10 (2) in an acceptable form, so that, even if the respondents are wrong on the other points of the case, his evidence has not cut them off from the right to compensation.

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[68] 68 C.L.R. 261.

[69] 328 U.S. 256.

The respondents' case rests on the principle that property should not be taken away or interfered with without compensation: see Blackstone's Commentaries (1765 ed.), vol. I, p. 135.

F. A. L. Harrison Q.C. in reply. The question whether stripping an owner of all rights of user, so that he was left with no practical use of his property, would amount to a taking does not arise in this case and the appellants do not wish to argue the extreme point.

The Act of 1920 cannot have been passed with the intention of restricting the Northern Ireland Parliament, so that local authorities acting under powers conferred on them before 1920 could regulate the use of property without paying compensation, but acting under powers conferred after 1920 could only regulate property in precisely similar circumstances if they paid compensation. The power to regulate the use of land does not, of course, include the power to prohibit its use entirely.

Dalziel's case,[70] relied on by the respondents, does not go so far as to say that the taking of a particular right to use land is a taking. It must be read with *Australasian United Steam Navigation Co. Ltd.* v. *Shipping Control Board*.[71] See also *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*[72] and *Hughes and Vale Proprietary Ltd.* v. *New South Wales*.[73]

The fact that a delegatee may abuse his powers does not affect the validity of the enactment under which he acts. When powers are such that they may be exercised either lawfully or unlawfully, lawful exercise is presumed. Unless the delegatee abuses his powers there is no room for the interference of the court.

As to compensation for injurious affection under the Lands Clauses Act, see Halsbury's Laws of England, 3rd ed., vol. X, pp. 8–10, paras. 7 and 8, and p. 155, para. 270. If the respondents are right in their contention of section 5 of the Act of 1920, the compensation which the Northern Ireland Parliament would have to enact in Lands Clauses Act cases would have to go beyond that which that Act itself requires.

In sections 9 (1) and 10 (2) of the Act of 1931 the expression "injuriously affected" does not have a meaning equivalent to damnum. Its meaning must be collected from the Act, and that meaning is cut down by exceptions. By section 10 (2) there is excluded from the category of injurious affection loss sustained by reason of the coming into operation of any provisions in a

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[70] 68 C.L.R. 261, 309.

[71] 71 C.L.R. 508.

[72] [1917] A.C. 76, 79.

[73] [1955] A.C. 241, 306.

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planning scheme which prescribe the height, character or use of buildings and which the Ministry considers reasonable for the purpose.

The latter condition was established by the evidence of Mr. Fitzgerald.

"Taking" has the same meaning as dispossessing and has nothing to do with injurious affection. In "taking" there is no room for any shades of meaning. Something very like a taking is not a taking. If some question of degree is involved, any test of degree must be capable of a wide, simple application. The criterion might be that section 5 strikes at such takings of property as are not merely regulatory.

W. B. Maginess Q.C., Attorney-General for Northern Ireland. As to the evidence, the matter should either be left as it is or else a certificate under section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, should be given.

As to the meaning of "directly or indirectly," a transfer of property from one person to another is direct, while, if an agency is employed, it is indirect.

To establish invalidity here it would have to be shown that while purporting to exercise a regulatory power the action of the authority was in a real sense confiscatory.

When a power to regulate is conferred which may be abused, the court will not presume that it will be arbitrarily exercised, and to confer such a power is not invalid: see *Lieberman* v. *Van de Carr.*[74]

Their Lordships took time for consideration.

Dec. 14. VISCOUNT SIMONDS stated the facts and the two questions posed by the arbitrator, and continued: My Lords, the second question must appear at the present stage of my narrative somewhat cryptic. It is, in my opinion, of a formal character, and I will defer consideration of it until I have disposed of the important matters that arise under the first question. These are, first, a question arising on the construction of the Act of 1944, viz., whether section 6 (4) of that Act incorporates a reference to section 10 (2) of the Act of 1931 as well as to the compensatory provisions of section 9, and secondly, whether section 10 (2) is a valid enactment having regard to the provisions of section 5 of the Government of Ireland Act, 1920. The far-reaching importance of the second question is obvious.

[74] (1905) 199 U.S. 552, 562.

My Lords, upon the first of these questions I entertain no doubt, and I cannot state the answer to it in a manner more clear and comprehensive than the learned Lord Chief Justice has done. Section 6 (4) of the later Act does incorporate section 10 (2) of the earlier Act. I will not occupy your Lordships' time by further reference to it.

Upon the second question, viz., the constitutional validity of section 10 (2) of the Act of 1931, I must say something more. For, though I agree with much that the Lord Chief Justice has said on this topic, there comes a point at which I must with great respect diverge from him.

The issue turns on the true meaning and effect of section 5 of the Government of Ireland Act, 1920. Subsection (1) of that section is as follows: "In the exercise of their power to make "laws under this Act neither the Parliament of Southern Ireland "nor the Parliament of Northern Ireland shall make a law so as "either directly or indirectly to establish or endow any religion, "or prohibit or restrict the free exercise thereof, or give a "preference, privilege, or advantage, or impose any disability or "disadvantage, on account of religious belief or religious or "ecclesiastical status, or make any religious belief or religious "ceremony a condition of the validity of any marriage or affect prejudicially the right of any child to attend a school receiving "public money without attending the religious instruction at that "school, or alter the constitution of any religious body except "where the alteration is approved on behalf of the religious body "by the governing body thereof, or divert from any religious "denomination the fabric of cathedral churches, or, except for "the purpose of roads, railways, lighting, water, or drainage "works, or other works of public utility upon payment of compensation, any other property, or take any property without "compensation.

"Any law in contravention of the restrictions imposed by this "subsection shall, so far as it contravenes those restrictions, be "void."

It was first urged on behalf of the appellants that the last five words of the first paragraph of this subsection referred only to the property of religious bodies or institutions. This point was decided against them 20 years ago in *O'Neill* v. *Northern Ireland Road Transport Board*,[1] and I do not doubt that that case was rightly decided. An argument founded on the historical genesis of these words, which was in any case of little weight, could not prevail against their plain meaning.

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[1] [1938] N.I. 104.

Next, I must refer to an argument (though I am not clear which side could be assisted by it) that the words "either directly "or indirectly" do not govern the last five words. But grammatically they clearly do, and I see no reason for not allowing grammatical laws to prevail. In any view it is of no importance to this case.

I come then to the substantial questions: what is the meaning of the word "take"? what is the meaning of the word "property"? what is the scope of the phrase "take any property "without compensation"? My Lords, I would declare my indebtedness not only to the counsel for the parties but also to the Attorney-General for Northern Ireland and those assisting him for the help that they have given the House in the consideration of these questions. With their aid your Lordships have explored the federal constitutions of the United States of America, of Canada and of Australia, in which are to be found words similar, but perhaps not very similar, to the words now under review. But, my Lords, I doubt whether at the end of that journey the path is brightly illuminated.

I should like, however, before I venture upon it, to consider for a moment the simple language of the constitutional Act with which we are concerned. I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that that authority had "taken" that owner's "property." He would not make any fine distinction between "take," "take "over" or "take away." He would agree that "property" is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called "property" and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a "taking," "taking "away" or "taking over" of "property."

I do not seek to qualify in any way what has been said in such cases as *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*[2] I have no right to do so. It is, no doubt, the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms. But this principle, upon which learned counsel for the respondents so vigorously insisted, seems to me to have no bearing upon the question what is the meaning of the phrase " take property without compensation " in a constitutional instrument such as the Government of Ireland Act. If, indeed, I must have recourse to any broad principle of law for the construction of these few simple words, I should remind myself that from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim sic utere tuo ut alienum non laedas, but by positive enactments limiting his user or even imposing burdens upon him. I do not therefore approach this question of construction with any predisposition to enlarge the scope of the vital words. For, my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate, not only in this particular field in a manner recognised as necessary to its proper fulfilment in Great Britain, but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest. Learned counsel for the respondents were constrained to admit that their success in this argument might lead to the invalidation of numerous Acts whose validity has been hitherto unchallenged. It would not be easy to reconcile this result with the power accorded to the Parliament by section 4 of the Act to make laws for the peace, order and good government of Northern Ireland. It is right, however, that in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems. I do not think that any better examples can be found than in the passages cited by the Lord Chief Justice from the judgments of Holmes J. and Brandeis J. Thus, when Brandeis J. says in the passage quoted by the Lord

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[2] [1919] A.C. 744; 35 T.L.R. 552.

Chief Justice from his judgment in *Pennsylvania Coal Co.* v. *Mahon*[3]: "Every restriction upon the use of property imposed "in the exercise of the police power deprives the owner of some "right theretofore enjoyed, and is, in that sense, an abridgment "by the State of rights in property without making compensa-"tion. But restriction imposed to protect the public health, "safety or morals from dangers threatened is not a taking. The "restriction here in question is merely the prohibition of a noxious "use," that very learned judge indicated in clear terms the distinction which should guide us in determining whether or not legislation which diminishes the owner's free enjoyment of his own property is a "taking" of that property. It is clear that such a diminution of rights can be affected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed.

I will say only one thing more about the American cases. The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of Holmes J. in the case already cited[4]: "The general rule "at least is, that, while property may be regulated to a certain "extent, if regulation goes too far it will be recognised as a "taking." If the question is one of degree, I am clearly of opinion that the day did not arrive with section 10 (2) of the Act of 1931.

My Lords, the distinction drawn between "regulating" and "taking" of "regulatory" and "confiscatory" will at once bring to mind the controversy to which placitum (xxxi) of section 51 of the Australian Constitution has given rise. Upon decisions of the High Court of Australia on this placitum the respondents strongly relied. At one stage learned counsel said he was prepared to rest his case on the *Minister of State for the Army* v. *Dalziel*,[5] the facts in which case were widely different from those we have now to consider. No doubt the language there under review "the acquisition of property on "just terms" was not dissimilar to that in our constitutional Act, and these words have led to much the same controversy as have the Fifth and Fourteenth Amendments in the United States of America. Nor do I doubt that the same considerations are relevant to the determination of their meaning. Nor would I cast the least doubt upon the decision in *Dalziel's* case,[5] or anything that was said by the learned judges who decided it. But, having said so much, and fully recognising the distinction that may exist between measures that are regulatory and measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be confiscatory, I must add that, if, as I suppose it is, the question is one of degree and the dividing line is difficult to draw, yet I have no doubt that such an enactment as the Act of 1931, and in particular section 10 (2), falls well on the regulatory side of it. The respondents get no help from Australia.

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[3] (1922) 260 U.S. 393, 417.

[4] Ibid. 415.

[5] (1944) 68 C.L.R. 261.

I have used the expression "in substance confiscatory" and that takes me to Canada. In the consideration of the constitutional validity of legislation of the Federal or (as the case might be) of Provincial Parliaments the expression "pith and substance" came to be commonly used in order to determine whether an enactment was truly within the legislative power of the one Parliament or the other under the British North America Act. It is an expression that has had its uses not only in Canada: see *Gallagher* v. *Lynn.*[6] But I think that it can give little assistance to your Lordships in considering the meaning of our five words, to which I now return. For there is one aspect of the case which deserves particular attention, since by it the Lord Chief Justice was influenced to consider the section invalid. Having held (and, as I think, rightly held) that much that is entirely reasonable may be done under the powers conferred by section 10 (2), and that those powers are capable of being exercised reasonably, the learned judge says: "But, if such "powers are capable of being exercised reasonably, it is impos-"sible to say that they may not also be exercised unreasonably." And after giving examples of unreasonable exercise he concludes: "If, then, a planning authority exercises any of the powers to "which section 10 (2) relates in a manner which fails to satisfy "what I have called the second test by being unreasonable and "thereby causes loss or damage which constitutes a taking and "to meet which no right to compensation is available, there will, "in my opinion, be a breach of section 5 (1)" [i.e., of the Government of Ireland Act]. My Lords, it appears to me that the short answer to this contention (and I hope that its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. It is not for the "planning authority" but for the Ministry to determine whether a proposed exercise of the powers

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[6] [1937] A.C. 893; 53 T.L.R. 929; [1937] 3 All E.R. 598.

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is reasonable. That is an administrative duty, to be exercised not arbitrarily but for the purposes of the Act. If it is not so exercised, it is open to challenge, and there is no need for express provision for its challenge in the statute. If I understand the learned Lord Chief Justice, he would not consider the section invalid if the duty of deciding upon the reasonableness of the exercise of a power was given not to the Ministry but to the judiciary. But I find it difficult to suppose it to be the purpose or theory of any constitution that a purely administrative function of this character should be given to the judiciary rather than to the executive. Matters of policy which are determined by the Government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary. Their function begins if and when for any reason administrative action lays itself open to challenge. The measure itself is not open to such challenge unless it is plainly and on the face of it within the prohibition. That condition is not satisfied merely because the powers it confers upon the executive may be exercised unreasonably. I am therefore of opinion that the ground upon which specifically the Lord Chief Justice held the section to be invalid was not sound.

I would answer the first question posed by the arbitrator: No, provided that the arbitrator is satisfied by proper evidence that the Ministry considers the provisions reasonable.

I must now return to the second question upon which the arbitrator asked the opinion of the court, viz., whether the evidence of Mr. A. P. Fitzgerald was sufficient to satisfy the requirements of the relevant section, i.e., that "the Ministry, "having regard to the nature and situation of the land affected "by the provisions, considers reasonable for the purpose" the provisions inserted in the planning scheme to which the subsection refers. [His Lordship set out the evidence of Mr. A. P. Fitzgerald and continued:] The question is whether this evidence satisfied the statutory requirement. I think that there are really two questions here, one of substance, the other of form. Upon the question of substance I find no legitimate ground of criticism. It appears to me that, since section 6 (4) of the Act of 1944 is designed to meet precisely the case where no planning scheme has yet been prepared and submitted for approval, the Ministry satisfies the conditions of section 10 (2) of the earlier Act if it considers provisions to be reasonable which it would consider reasonable having regard to the nature and situation of the land thereby affected if a scheme had been made embracing that land.

It is not possible to be more specific than the situation envisaged by the later Act admits. The question of form, however, remains. In a matter of this importance strict adherence to form is requisite. It is not, to my mind, satisfactory that, if oral evidence is necessary, it should be given by a witness who, admittedly knowing nothing about it, speaks on instructions. I should therefore, without meaning any disrespect to Mr. Fitzgerald, say that his evidence should be disregarded. But this does not end the matter. I do not think that it was necessary or, indeed, proper for the appellants to prove that the Ministry thought the provisions in question reasonable by the introduction of an officer of the Ministry to give oral evidence. It is not a matter for cross-examination of this or that official of the Ministry or of the Minister himself. Nevertheless, the statutory fact must be strictly proved, and it appears to me that the proper course is that a certificate should be issued to the required effect under the Minister's seal and duly authenticated. Such a certificate when tendered would prove itself under section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921.

I answer the second question posed by the arbitrator in the negative. With these answers the case will go back to him for his further determination and answer.

My noble and learned friend, LORD COHEN, who is unable to be here this morning, has asked me to say that he concurs in the opinion that I have just given, and with that which my noble and learned friend, Lord Radcliffe, will shortly give.

LORD RADCLIFFE. My Lords, I am in full agreement with what has been said by my noble and learned friend on the Woolsack. That being so, I do not think that it would serve any useful purpose if I travelled again over the same ground.

It is no disrespect to the learning and weight of the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland if I say that my principal reason for disagreeing with his conclusion is that I do not believe that the present case raises the issues that he has dealt with quite in the form in which he considers them. The fundamental question, as I see it, is whether the prohibition of taking any property without compensation contained in section 5 (1) of the Government of Ireland Act, 1920, bars the enactment by law of such restrictions on the user or development of property as are referred to in section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, unless compensation is provided. In my opinion, it does not, because it seems to me that the word "taking" when used in this context does not extend to cover the act of imposing restrictions of that kind.

I do not see how you can give a meaning to this phrase, "taking without compensation," except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.

Side by side with this, however, and developing with increasing range and authority during the second half of the nineteenth century came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved, so far at any rate as the United Kingdom is concerned, to speak of them as "police powers." They went far beyond that. Their chief sphere was in the delegated legislation conceded to local authorities, though in some cases they arose from the direct legislation of Parliament itself. Achieved by one means or the other, there is no doubt at all that the effect of them was to impose obligations and restrictions upon the owner of town land which impaired his right of development, prohibited or restricted his rights of user and, in some cases, imposed monetary charges upon him or compelled him to expend money on altering his property. Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property.

A perusal of the Public Health Act, 1875, will be sufficient to make the point. It shows how extensive interference could be, even at that date. Only in a few special cases is compensation provided for the consequence of interference. No one, so far as I know, spoke of this as a " taking of property " or treated the general principle of " no taking without compensation " as applicable to the case. For instance, by-laws, which have to be "reasonable," i.e., not manifestly unjust, if the courts are to sustain them, were upheld, even though seriously restricting the user of property without affording any compensation for the restriction (see *Slattery* v. *Naylor*,[7] a case from Australia).

When town planning legislation came in eo nomine in 1909 the emphasis had no doubt shifted from considerations of public health to the wider and more debatable ground of public amenity. It may possibly have been for this reason, I do not know, that the Act of 1909 included a comprehensive, though not exhaustive, " injurious affection " section, the effect of which was to give property owners whose rights were interfered with in the cause of town planning a right to compensation for any damage that they suffered, subject to counterclaims for betterment and certain exclusions. This " injurious affection " embraced an altogether wider category of injury than the " injurious affection " that had been the subject of compensation under the Lands Clauses Act, 1845. In fact, as we know, section 59 (2) of the Housing, Town Planning, etc., Act, 1909 (which did not itself extend to Ireland), excluded compensation for injurious affection in respect of several of the same heads of restriction as those which are found in section 10 (2) of the 1931 Act in Northern Ireland. I do not think that this last circumstance has any bearing on the present issue: the Westminster legislature with its full sovereignty might be able to exclude compensation in cases where the Northern Ireland Parliament under its constitutional limitations could not. What is important, I think, is to recognise that though interference with rights of development and user had come to be a recognised element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a " taking " of property nor, when compensation was provided, was it provided on the basis that property or property rights had been

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[7] (1888) 13 App.Cas. 446; 4 T.L.R. 426.

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" taken," but on the basis that property, itself retained, had been injuriously affected.

These considerations lead me to the following conclusions: (1) The taking of property referred to in section 5 (1) of the Government of Ireland Act, 1920, ought not to be treated as applying to the imposition of restrictions on user and development under town-planning powers. (2) It is within the competence of the Parliament of Northern Ireland to decide on what occasions and to what extent compensation is to be afforded for injury suffered under such restrictions. (3) Section 10 (2) of the Act of 1931 is accordingly a valid enactment.

Viewing the matter from this aspect, I do not think that the requirement that compensation can only be excluded if the Ministry concerned passes the restrictions as reasonable for the purpose raises any relevant issue. If compensation could validly be excluded anyway in such cases, the legislative power cannot have been less validly exercised because the town-planning authority's liberty to exclude compensation has been limited by such a provision. It may be in itself a very salutary limitation: but that is not a matter for the court.

It follows, too, that the question whether the provision " ousts " the jurisdiction of the court " in any relevant sense—a question to which the learned Lord Chief Justice gave much attention in the later passages of his judgment, and upon which he ultimately founded his decision of the appeal—does not, in my opinion, arise.

I do not imply by what I have said that I regard it as out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a " taking " of the land affected for the benefit of the public. It is not very easy to imagine such a restriction being imposed by a responsible authority or surviving the test of the Ministry's approval, the more so as the Act deals separately with open spaces as a subject of acquisition, not without compensation. But given that such a case might hypothetically occur, the question for us is whether that possibility in itself is sufficient to invalidate section 10 (2), the natural subject of which is restrictions and not " takings." I do not think that it is. It seems to me the wrong way to treat the constitutional provision. To my mind, it does more justice to its intent if a restriction which is in substance a taking, should one ever occur, is attacked ad hoc as not within the true meaning and scope of section 10 (2) than that the whole subsection should be thrown on the scrap-heap as constitutionally an outlaw.

The second question raised by the official arbitrator's case stated relates to formalities only, except so far as it may incidentally throw light on the question whether section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, is introduced into interim development by section 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944. The case stated is accepted by both sides as a consultative case: therefore, if it is right to conclude that the evidence given by Mr. A. P. Fitzgerald is insufficient to prove the consent of the Ministry of Health and Local Government, the hearing before the arbitrator must be continued and the necessary evidence called for or tendered.

This question of the form of evidence required is not an easy one, but, on the whole, I take the same view as that which has been taken in the Divisional Court and the Court of Appeal in Northern Ireland on this issue, if not for quite the same reasons.

What has to be before the tribunal, if effect is to be given to section 10 (2), is the view or judgment of " the Ministry " that certain planning provisions are reasonable for the purpose. The Ministry itself is an impersonal legal entity, and it is only by some use of metaphor that such mental processes as views can be attributed to it. The question is not how they can be or why they have been formed, but how they can be proved so that a tribunal can act upon them. For this purpose I do not think that one should look for the Minister himself or some senior official to attend in person so as to satisfy the court by oral testimony that " the Ministry " in fact holds the required opinion. Indeed, I should not regard cross-examination as open on the issue whether the Ministry should hold such an opinion, given that it declares that it does. The natural and, I think, the proper way to record the view of the Ministry in such a context is to bring into existence a certificate over the Ministry's proper seal, authenticated as the statute requires, and to tender that before the arbitrator. If so tendered, it will prove itself by virtue of section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, " unless the contrary is shown."

It was one aspect of the respondent's argument that until a planning scheme in the proper sense had come into operation no such Ministry view as that required by section 10 (2) of the Act of 1931 could be formed or expressed. I do not agree with this, if one once arrives at the conclusion, as I believe that all your Lordships do, that section 6 (4) of the Act of 1944 necessarily involves the hypothesis that the provisions of section 10 (2) are adapted to the situation where a projected development has been restricted under interim development control. A certificate given under those conditions in the present case would be to the effect that the Ministry considered that the provisions prescribing height, character and user of buildings and sites, which by virtue of the Planning Acts (Northern Ireland), 1931 and 1944, and the Planning (General Interim Development) Order (Northern Ireland), 1944, and the refusal by the appellants of the respondent's application to proceed with development had been imposed upon the respondent's land, were, having regard to the nature and situation of the land affected, reasonable for the purpose.

I do not think that the evidence actually tendered by Mr. Fitzgerald ought to be treated as adequate to prove the Ministry's view. It is true that he was introduced by a letter from Mr. Green, an assistant secretary: but the letter itself is neither a certificate nor evidence of the essential fact to be proved, since its purport was to say that the necessary evidence would be afforded by Mr. Fitzgerald when he appeared. What Mr. Fitzgerald said, when he did appear, was to the effect that he had no personal knowledge of the facts of the case, and had taken no part in the Ministry's discussions, but was sent to report what the Ministry's view was. No one can be expected to be altogether satisfied with this. His evidence of the relevant fact is only hearsay, and his own status is reduced to that of a messenger. I do not mean to imply any disrespect to him in the situation in which he was placed, but it seems to me that, if his Ministry does wish to communicate its opinion through a messenger, he ought to be allowed to carry with him a formal warrant of its view over the proper seal.

LORD KEITH OF AVONHOLM. My Lords, I agree.

Appeal allowed.

[It was ordered that the respondents should pay to the appellants three-quarters of their costs in the courts below, and that there should be no order as to costs in this House.]

Solicitors: *Lees & Co. for John Young, Belfast; Simpson, Palmer & Winder for N. & F. Tughan & Walmsley, Belfast; Linklaters & Paines for the Chief Crown Solicitor, Belfast.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)* ELMDENE ESTATES LTD. . . . . APPELLANTS;

AND

WHITE . . . . RESPONDENT.

1959
Dec. 7, 8.

1960
Jan. 21.

Landlord and Tenant—Rent restriction—Premium—Paid to third person—Grant of tenancy conditional on sale of house at undervaluation—Person requiring premium—Demand by landlords' agents—Benefit not received by landlords but by separate though associated company—Meaning of "premium"—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *ss.* 2, 18.

Contract—Construction—Substance or form of transaction—Rent restriction—Need to look at reality (post, p. 538).

Judicial Precedent—Statute—Construction—Penal statute—Decision in favour of subject affecting subsequent property rights—Rent restriction—Illegal premium (post, p. 541).

Statute—Construction—Penal Act—Mischief aimed at—Landlord and Tenant (Rent Control) Act, 1949, *s.* 2 (post, p. 539).

Words and Phrases — "Premium" — "Pecuniary consideration" — "Paid."

By section 2 of the Landlord and Tenant (Rent Control) Act, 1949: "(1) A person shall not, as a condition of the grant, renewal "or continuance of a tenancy to which this section applies, require "the payment of any premium in addition to the rent. . . . "(5) Where, under an agreement made after March 25, 1949, any "premium has been paid which . . . could not lawfully be required "under the foregoing provisions of this section . . . the amount of "the premium, or so much thereof as could not lawfully be required ". . . shall be recoverable by the person by whom it was paid: . . ."

By section 18 (2): "In this Act . . . the expression 'premium' "includes any fine or other like sum and any other pecuniary con"sideration in addition to rent."

As a condition of obtaining for the plaintiff the grant of a tenancy of a dwelling-house within the scope of the Rent Acts, a firm of estate agents, C. & C. Ltd., required the plaintiff and his wife to sell their house to a property company, P.T.E. Ltd., for £500 less than the market value. The tenancy was granted by the defendant company, which was closely associated by shareholding and directors with the other two companies, though the benefit of the £500 was not transferred to the defendant company. The plaintiff brought proceedings to recover the sum of £500 from the defendant company as an unlawful premium:—

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

Held, (1) that the defendant company was requiring the payment of a "premium" within the meaning of section 18 (2), since this was in substance a consideration stated in terms of money, although disguised by the cloak of a sale of property at an undervalue (post, p. 538).

"Pecuniary consideration" includes any consideration sounding or expressed in terms of money whereby there is a benefit to the landlord or a detriment to the tenant (post, pp. 542, 548).

(2) That the transaction was not removed from the operation of the Act by the fact that the premium was required to be paid, not to the defendant company, nor to any person on its behalf, but to a third party, since it could not be supposed that the legislature intended that a landlord might lawfully require the payment of a premium for the benefit of a wife, a son, a daughter or a third party (post, pp. 538, 540, 543, 550).

Rex v. *Birmingham (West) Rent Tribunal* [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198 distinguished.

Remmington v. *Larchin* [1921] 3 K.B. 404 (C.A.); 37 T.L.R. 839 considered.

Decision of the Court of Appeal [1960] 1 Q.B. 1; [1959] 3 W.L.R. 185; [1959] 2 All E.R. 605 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Ormerod and Willmer L.JJ.).

This was an appeal by the appellants, Elmdene Estates Ltd. (the defendants in the action), from an order of the Court of Appeal dated April 28, 1959, allowing with costs the appeal of the respondent, William Alfred White (the plaintiff), against the judgment of Judge Leon in favour of the appellants, given on October 29, 1958, in Willesden County Court in an action brought by the respondent against the appellants.

The respondent in June, 1958, sued for £500, claiming that the appellants had within the meaning of sections 2 (1) and 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, required the payment of a premium of that amount as a condition of granting the respondent a tenancy of a first-floor flat at No. 108, Welldon Crescent, Harrow, in August, 1952, the respondent having been required to convey the freehold of No. 174, The Heights, South Harrow, to Pegasus Training Estates Ltd. for £1,800, whereas, as the appellants and the respondent both knew, the fair market value at the time was between £2,300 and £2,400.

The facts stated by the county court judge were as follows: "The facts as I found them to be were as follows: At the relevant time the plaintiff and his wife were joint owners of 174, "The Heights, South Harrow (hereinafter called '174'), where "they lived. The house was subject to a mortgage, payments "under the mortgage deed were in arrear and the plaintiff and "his wife decided that the only way out was for them to sell "174, repay the mortgage money out of the price obtained and "obtain a flat. They had nowhere to go, they were compelled to "leave their own house and were just the sort of people whom a "landlord who wanted an illegal premium would have liked to "meet. They were just the sort of people for whose benefit "section 2 of the Act of 1949 was passed.

"During their quest for a flat they passed the window of "Clifford & Clifford Ltd. (hereinafter called 'Clifford') who "were estate agents, and they saw advertised in the window a "self-contained flat to let unfurnished. They went in and asked "if the flat was available and if they could see it. Clifford's "representative, a Mr. Williamson, replied to their question with, "'Have you got a house to sell?' They said 'Yes' and Mr. "Williamson then said he would take them over the flat, 108, "Welldon Crescent. They went to see it and liked it.

"It was conceded on behalf of the defendants that the tenancy "offered and subsequently granted was one to which the Rent "Restriction Acts and in particular the Act of 1949 applied. Mr. "Williamson then made it plain to the plaintiff and his wife "that they could not have the tenancy of the flat unless they "were prepared to sell 174 at £500 less than its fair market value. "I was satisfied that the fair market value of that house was at "the time between £2,300 and £2,400, and that Clifford knew this "very well, and on behalf of the defendants required the plaintiff "and his wife to sell it to purchasers who turned out to be "Pegasus Training Estates Ltd. (hereinafter called 'Pegasus') at "£500 less than its value.

"The plaintiff and his wife thought it over and, as they had nowhere else to go they felt they had no alternative but to agree.

"They accordingly sold 174 to Pegasus for £1,800 and received "in return from the defendants a tenancy of 108, Welldon "Crescent at a weekly rent of £1 15s. I hold that the sale by "the plaintiff and his wife to Pegasus of 174 at an undervalue "amounting to £500 was required by Clifford acting for the "defendants as a condition of the tenancy being granted by "the defendants to the plaintiff."

He further held that the whole transaction was not colourable or a sham.

Of the 5,000 issued shares of the appellant company of £1 each, 1,000 belonged to Melville Francis Van Dooren, who also held 2,500 of the 6,600 issued shares of £1 each in Pegasus.

Mabel Victoria Van Dooren, who lived at the same address as he, held another 1,000 shares of the appellant company and another 2,500 shares of Pegasus, while 1,000 shares in each of the companies belonged to Elmer John Van Dooren. Clifford had a share capital of £1,500, of which Melville Francis Van Dooren (who was a director) had 120 £1 shares, Mabel Victoria Van Dooren 340 shares and Elmer Elsworth Jones 500 shares.

L. G. Scarman Q.C. and *C. F. Dehn* for the appellant company. The appellants required the respondent to confer a benefit on a third party, but selling at an undervalue is not properly to be regarded as the payment of a premium. Section 2 (5) of the Act of 1949, dealing with the recovery of a premium, does not envisage the situation of a third party being involved in the transaction, and the particular benefit conferred here does not come within the definition of a premium in section 18 (2). It is to be noted that the judge rejected the idea that the transaction was merely colourable or a sham or a cloak, and found that this was one transaction and a genuine transaction, and that Pegasus was intended to get the benefit of it. There is nothing illegal in a landlord seeking to make an arrangement which does not fall within the prohibition of the Act.

In order to succeed, the respondent had to show that the transaction was the requiring of the payment of a premium in addition to the rent within section 2 (1), followed by the payment of such a premium. He has failed in that, because: (1) there was no payment of a premium, and (2) the Act requires that the payment, in order to come within the prohibition, must be made to the person requiring payment of the premium or to another person on his behalf, whereas, as the judge rightly held, this payment (if it was a payment) was made to a third party for that party's benefit and not on behalf of the party requiring the premium.

The respondent has not shown that he has paid a premium, because the prohibition in the Act is concerned with the payment of money. If a benefit is conferred which is not a payment of money, it is outside the prohibition, even though it may have a monetary value. The word " payment " is appropriate to refer to a transfer of cash and is not apt to cover the benefit conferred in this case, which, though it had a value, was not a cash or money benefit. Reliance is placed on *Henderson* v. *Arthur*[1] and

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[1] [1907] 1 K.B. 10, 13 (C.A.); 23 T.L.R. 60.

Inland Revenue Commissioners v. *St. John's College, Oxford.*[2] Payment, admittedly, is not always made in cash, but the word is well understood. The expression "payment of any premium" should be read taking "pecuniary consideration" in the definition of "premium" in section 18 (2) as including monetary instruments like bills or cheques. As to the meaning of "premium," see *King* v. *Earl Cadogan,*[3] *B. G. Utting Ltd.* v. *Hughes*[4] and *In re Cosh's Contract.*[5]

Rex v. *Birmingham (West) Rent Tribunal,*[6] which was followed by the county court judge, was rightly decided. It held that in order to be a premium, the payment must be made to the landlord himself and not to some other person. That case has stood since 1951 and should not be upset now, since many landlords must have arranged their affairs on the basis of it.

As to the meaning of "payment," the line should be drawn by the limiting phrase in the Act so that transactions which are analogous to payment, though not technically payment, are covered, that is, cases like payment by cheque. But the Court of Appeal in this case draws no line.

A narrow construction should be placed on the expression "pecuniary consideration" in section 18 (2). It was used in section 8 of the statute 17 Geo. 3, c. 26 (dealing with sales of life annuities): see the construction given to that Act in *Crespigny* v. *Wittenoom*[7] and *Hutton* v. *Lewis.*[8]

The prohibition of premiums can be traced from the early Rent Acts: see section 1 (2) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915; section 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; section 9 (1) of the Rent and Mortgage Interest Restrictions Act, 1923; section 4 (1) (*b*) of the Furnished Houses (Rent Control) Act, 1946; section 12 (4) (*b*) of the Landlord and Tenant (Rent Control) Act, 1949, and section 14 of the Rent Act, 1957. Throughout these Acts the prohibition is concerned with money and money consideration. It is to be concluded from a comparison of their terms that the words are now confined to actual payments of money, or to transactions involving something closely analogous to it. In the present case there is merely the conferring of a benefit which can be assessed in terms of money. Unless one adopts a strict construction of the section, one is moving into confusion and doubt.

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[2] [1915] 2 K.B. 621, 634, 636.

[3] [1915] 3 K.B. 485, 492 (C.A.).

[4] [1939] 2 K.B. 231, 245 (C.A.); 55 T.L.R. 556; [1939] 2 All E.R. 126.

[5] [1897] 1 Ch. 9, 13–14 (C.A.).

[6] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

[7] (1792) 4 T.R. 790, 792.

[8] (1794) 5 T.R. 639.

If one could spell out of this transaction a payment from the respondent to Pegasus, his argument would have some relevance, but, on the special facts of this transaction, this is a case of a sale of a house at an undervalue and nothing else, which is no more a payment than giving a ton of apples would have been a payment. Parties to a transaction are entitled to arrange matters so as not to attract the control of the Acts: *Maclay* v. *Dixon*[9] and *Samrose Properties Ltd.* v. *Gibbard*.[10]

What Pegasus received was not " pecuniary consideration " or money, but money's worth. It is to be noted that the provision as to illegal premiums in section 4 (1) (*b*) of the Act of 1946, repealed by section 12 (4) (*a*) of the Act of 1949, did refer to " any consideration," which section 2 (1) of the Act of 1949 does not. There are many possible benefits which a landlord may secure from a tenant, but which are not premiums, such as delivery of goods or rendering of services. This prohibition of premiums is, moreover, supported by a criminal sanction. A penalty is imposed for breach of it, and, accordingly, a clear and easily understood line should be drawn and the appellants should be given the benefit of any ambiguity there may be in the terms of the Act. On the decision of the Court of Appeal in this case, if there had been no quantification of the undervalue, the appellants would not have been within the prohibition at all. The distinction is too fine. Section 1 (1) of the Sale of Goods Act, 1893, distinguishes between the consideration moving from the vendor and that moving from a purchaser and calls the latter " a " money consideration." A " pecuniary consideration " is a cash consideration.

On the wording of the Act of 1949 a money payment is contemplated by the word " premium." In section 2 (1) the words " in addition to the rent," and in section 18 (2) the words " in " addition to rent," are used, and part of the definition is a " fine " or other like sum." Section 2 (5) and (6) contains references to the premium being " paid." Section 2 (5) also uses the word " recoverable," and section 2 (6) uses the word " repaid." Further, the wide meaning contended for by the respondent does not fit in well with section 3, which enacts that the demand of an excessive price for furniture is to be treated as a demand for a premium, because if the words "any other pecuniary consideration" were to be given a meaning wide enough to cover the present transaction, it would also cover the transactions covered by section 3, which would thus be unnecessary.

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[9] (1943) 170 L.T. 49, 50 (C.A.); [1944] 1 All E.R. 22.

[10] [1958] 1 W.L.R. 235, 239 (C.A.); [1958] 1 All E.R. 502.

But, apart from that point, payment of a premium within the Act involves payment to, or on behalf of, the landlord and not to another, say, even his own son as beneficiary and not accountable to him. This appears from the terms of section 2 (1), (5) and (6), and no additional words need be read into the section to support it. In such a case the plaintiff claims to recover the sum in question, but the Act says nothing specifically about the person from whom the sum is recoverable. It is concerned in terms with the person who has required the payment of the premium, and, in the context of the law of landlord and tenant, it is understood that the payments aimed at are those made to the landlord or his assignee and not to anyone else. To the extent that the Act does not say expressly that the premium must be one paid to the landlord, it is ambiguous and the ambiguity should be resolved in favour of the appellants, particularly in view of the penal provision in section 2 (6): see *Remmington* v. *Larchin.*[11]

R. E. Megarry Q.C. and *Henry Palmer* for the respondent. It is immaterial whether the requirement of a reduction in price is made in favour of the landlord or a third party; it is a premium within the section nonetheless: see *Inland Revenue Commissioners* v. *Marquess Camden,*[12] *King* v. *Earl Cadogan*[13] and *Temple* v. *Lewis.*[14] On this point it is not for the court to lay down any line precisely drawn so as to enable landlords who wish to evade the Act to keep on the safe side. It is only for the court to say whether a particular case falls within the prohibition of the Act.

The main point is whether or not the thing done here amounts to a pecuniary consideration within the Act. This transaction was closely analogous to a payment of money. It is enough that the parties should in fact have quantified the benefit conferred in terms of money. Any consideration regarded by the parties in terms of money or as a substitute for money is a pecuniary consideration. Here the minds of the parties were directed to money; even without a formal quantification it would be clear that they were doing so. In section 53 (xviii) of the Administration of Estates Act, 1925, "valuable consideration" is defined as including marriage, but marriage is not money or pecuniary consideration. Similarly, for A to submit to a restrictive covenant affecting his own land in return for the grant of a tenancy of a flat to him by B, would not be a transaction which would fall within section 2, since the parties would not be thinking in terms of money.

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[11] [1921] 3 K.B. 404 (C.A.); 37 T.L.R. 839.

[12] [1915] A.C. 241 (H.L.).

[13] [1915] 3 K.B. 485, 490, 492–493.

[14] [1954] 1 Q.B. 22; [1953] 3 W.L.R. 762; [1953] 2 All E.R. 430.

The word "pecuniary" is derived from pecunia, which in turn comes from pecus, meaning cattle. *Montagu* v. *Browning*[15] shows that rent need not necessarily be pecuniary. The Rent Restriction Acts are applicable, when the rent takes the form of services, if they have been quantified in terms of money.

The appellants relied on section 3 of the Act of 1949, but it was clearly inserted ex abundanti cautela to remove any possible doubt as to an obvious means of attempting to evade the provisions of the Act. Section 14 of the Act of 1957 cannot affect the construction of the Act of 1949. As to section 14 (4) of the Act of 1949, its background is that before that Act there were two different sets of premium provisions in the Act of 1920 and the Act of 1946. The Act of 1949 recast the provisions of the Act of 1920 and brought them into line with the requirements of 1949. As to section 12 (2), the fact that the old premium provisions were repealed and re-enacted in different language does not affect their construction.

The words "pecuniary consideration" are amply wide enough to cover transactions in daily life which the parties in their own minds regard in terms of money. *Larocque* v. *Beauchemin*[16] (in which *In re Harmony and Montague Tin and Copper Mining Co.*[17] was expressly approved) is relied on. Payment by means of a sale at an undervalue is a way of satisfying the appellants' demand for £500, and it is still within the Act even if there has been no initial demand for £500. It would be most unsatisfactory to draw a thin line between two very similar transactions. The definition of "pay" in the Shorter Oxford English Dictionary is relied on. Though the word "paid" normally has a financial significance, this is not necessarily so.

In Rent Act cases the court will look at the substance rather than the form of a transaction, especially where it is necessary to prevent evasion of the Act: see the *Samrose* case.[18] Here, the reality of the matter is that £500 is being paid by the direction of the appellants to a third party. If a landlord wishes to take advantage of the Acts he must adhere to their substance and not merely to their form. This matter should be looked at from the tenant's point of view: see *Navarro* v. *Moregrand Ltd.*[19]

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[15] [1954] 1 W.L.R. 1039, 1043, 1044–1045 (C.A.); [1954] 2 All E.R. 601.

[16] [1897] A.C. 358, 364 (P.C.); 13 T.L.R. 336.

[17] (1873) L.R. 8 Ch. 407 (C.A.).

The definition of a premium in section 18 (2) of the Act of 1949 falls under four heads, (a) the natural meaning of the word, (b) a "fine," (c) any other sum like a fine, and (d) "any other "pecuniary consideration in addition to rent." This gives a wide meaning. The words "in addition to the rent" in section 2 (1) and "in addition to rent" in section 18 (2) indicate no more than something which is not rent. In section 2 (5) the word "recoverable" does not necessarily indicate getting back something which was yours. One speaks of recovering damages for an injury. In section 2 (6) the word "repaid" does not necessarily mean the return to the tenant of something which he has given.

As to the meaning of "premium" in *King* v. *Earl Cadogan*,[20] the court was dealing with the construction of the phrase in a different Act. The word "fine," though it normally has a financial meaning, does not necessarily indicate something financial in its nature: see *Gardner & Co. Ltd.* v. *Cone.*[21]

If the appellants were right, all they would have to do in order to evade the Act would be to express the transaction in some non-financial form. But for the purposes of section 2 of the Act the completion of this sale amounted to the payment of a premium. It is irrelevant that the appellants required the sale to be made to Pegasus.

L. G. Scarman Q.C. in reply. The judge has found that this was not a bogus transaction; therefore there was no payment within the Act.

In *Gardner & Co. Ltd.* v. *Cone* [21] Maugham J. was dealing with very different words in the Law of Property Act, 1925, and that authority is very little help in the present case. In this Act, where the words "fine" and "paid" are used, one is dealing with expressions which are used normally in the language of money. The purpose of the Act was to prohibit the payment of money.

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[18] [1958] 1 W.L.R. 235, 238, 243–244.

[19] [1951] 2 T.L.R. 674, 679–680 (C.A.).

[20] [1915] 3 K.B. 485, 490, 492–493.

[21] [1928] Ch. 955, 964.

Their Lordships took time for consideration.

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Jan. 21, 1960. Viscount Simonds stated the facts and continued: My Lords, the learned judge further pointed out the close interrelation of the three companies, namely, the appellant company, Pegasus and Clifford, but I do not attach any importance to this matter. He held that the transaction was not colourable or a sham. It is, no doubt, sufficiently explained by the interrelation.

In these circumstances the respondent brought his action. He founded on section 2 (1) of the Act to which I have referred, which provides that " A person shall not, as a condition of the " grant, renewal or continuance of a tenancy to which this section " applies, require the payment of any premium in addition to the " rent." Subsection (5) of the same section provides that: " Where, under an agreement made after March 25, 1949, any pre- " mium has been paid which, or the whole of which, could not law- " fully be required under the foregoing provisions of this section " . . . the amount of the premium, or so much thereof as could not " lawfully be required . . . shall be recoverable by the person by " whom it was paid: . . ." Subsection (6) provides that a person requiring any premium in contravention of the section should be liable on summary conviction to a fine not exceeding £100, and that the court by which he was convicted might order the amount of the premium, or so much thereof as could not lawfully be required under the section, to be repaid to the person by whom it was paid. By section 18 it was enacted that in that Act the expression " premium " included any fine or other like sum, and any other pecuniary consideration in addition to rent. I do not think it necessary to refer to any other sections of the Act.

Two questions arose. Did the appellant company require the payment of a premium within the meaning of the Act as the condition of a grant of a tenancy? If they did, was the transaction nevertheless removed from the operation of the Act by the fact that it was required to be paid, not to them nor to anyone on their behalf, but to a third party?

Both these questions the learned judge would have decided in favour of the respondent but felt himself bound to decide the second of them against him by the decision of the King's Bench Divisional Court in *Rex* v. *Birmingham (West) Rent Tribunal.*[1] Upon appeal the Court of Appeal unanimously allowed the appeal of the respondent. I have no doubt they were right.

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[1] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

My Lords, it is not quite clear that in the *Birmingham* case [1] the ratio decidendi was that a premium could not be unlawfully required within the meaning of the section unless it was required to be paid to the person making the requisition or to someone on his behalf. But, undoubtedly, the court made observations which asserted that construction. It is therefore important that your Lordships should state clearly that this is not a tenable view. The Act does not say so, and I see no reason for reading into it words which are not there and which, if they were, would go far to defeat its purpose. It cannot be supposed that the legislature intended that a landlord could not lawfully require the payment of a premium for his own benefit, but could do so for the benefit of a wife, a son, a daughter or any third party.

Upon what I have called the first question the learned judge held that the transaction amounted to the payment of a pecuniary consideration, and in this he was upheld by the Court of Appeal.

My Lords, it has been said before, and it must be said again, that in the consideration of questions arising under the Rent Acts the court must look at the substance and reality of a transaction, not its form: see, for example, *Samrose Properties Ltd.* v. *Gibbard.*[2] Of the real nature of this transaction no doubt can be entertained. It was born of the determination of the landlords to obtain a considerable sum of money in addition to the rent as a condition of the grant of a tenancy. It was carried out by requiring the sale of a house at an undervalue of £500. The respondent suffered a pecuniary detriment of that amount: the appellant company (or a third party to whom it surrendered that advantage) obtained a comparable benefit. If this is not a pecuniary consideration moving from the respondent, I do not know what those words mean. That there was consideration cannot be denied. Was it not pecuniary? That word is defined as meaning "of, belonging "to or having relation to money." There may be transactions in which it is difficult to say whether the consideration is pecuniary. The line dividing valuable consideration which is pecuniary from that which is not is a twilight line, but on one side of it in broad noonday is the transaction in which one party says to the other: "I will not grant you a tenancy unless you sell me a house for "£500 below its value." It is in substance, and I would be inclined to say in form also, a consideration stated in terms of money, and it is not disguised by the cloak of a sale of property at an undervalue.

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[1] [1951] 2 K.B. 54.

[2] [1958] 1 W.L.R. 235 (C.A.); [1958] 1 All E.R. 502.

The appellants sought to rely on fine distinctions between the language of the Act of 1949 and that of earlier Acts, but they appeared to me trivial and by no means to justify any departure from the plain meaning of the words we have to construe. They sought, too, to get some help from the word "payment" in the subsection. The transaction, they said, did not involve any payment by the respondent. That may be conceded. But, since pecuniary consideration includes something other than (a) a premium as commonly understood, (b) a fine, and (c) any other like sum, it is clear that the word "payment" must be given an extended meaning to cover whatever the pecuniary consideration may be.

Finally, the appellants urged that as the Act imposed a penalty for the breach of its provision, they should be given the benefit of any ambiguity in its terms. I have already indicated that I find no difficulty in determining on which side of a line that may not be easy to draw this case falls. There is no such ambiguity as to justify the invocation of the important principle asserted by Scrutton L.J. and Atkin L.J. in *Remmington* v. *Larchin*[3] and recently reasserted in this House.[4] Nor, I think, would your Lordships be over ready to apply it where a landlord deliberately contrives just the mischief that the Act is intended to avert, but claims that its provisions are susceptible of a meaning which provides a way of escape for him.

The appeal should, in my opinion, be dismissed with costs.

Lord Radcliffe. My Lords, in the month of August, 1952, the appellants granted the respondent a tenancy of a first-floor flat at 108, Welldon Crescent, Harrow, at a weekly rent of £1 15s. In the same month the respondent and his wife, at the direction of the appellants, conveyed the freehold of their house, 174, The Heights, South Harrow, to a limited company, Pegasus Training Estates Ltd., for the sum of £1,800. The only feature of this convenient exchange that might be thought to have been at all unusual was that, as the appellants and the respondent both knew, the fair market value of 174, The Heights at that time was between £2,300 and £2,400.

The sale of the house to Pegasus for £1,800 was not due, however, to any impulse of benevolence on the part of the respondent and his wife. On the contrary, it was a sacrifice to which they had to submit in order to obtain the accommodation at 108, Welldon Crescent, of which they were in need. Upon their first inquiry of the appellants' estate agents, who were advertising the vacancy, they were met with the pregnant question: "Have you "got a house to sell?" As the negotiation proceeded it was made plain to them that they could not have the tenancy of the flat unless they were prepared to sell their house for £500 less than its fair market value.

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[3] [1921] 3 K.B. 404 (C.A.); 37 T.L.R. 839.

[4] See *London & North Eastern Railway Co.* v. *Berriman* [1946] A.C. 278, 313–314 (H.L.); 62 T.L.R. 170; [1946] 1 All E.R. 255.

Nor was the conferment of this benefit on Pegasus an act of inexplicable benevolence on the part of the appellant company. It so happened that of its 5,000 issued shares of £1 each, 1,000 belonged to a Mr. Melville Francis Van Dooren, who also held 2,500 of the 6,600 issued shares of £1 each in Pegasus: a Mabel Victoria Van Dooren, having the same address as Mr. Melville, held another 1,000 shares of the appellants and another 2,500 shares of Pegasus: while 1,000 shares in each of the companies belonged to a Mr. Elmer John Van Dooren. Thus, the Van Dooren family can be seen to have enjoyed a certain community of interest in the fortunes of the two companies.

The tenancy of the flat at 108, Welldon Crescent, is one within the protection of the Rent Restriction Acts. The sole question in this appeal is whether the appellants required "the payment "of [a] premium in addition to the rent" within the meaning of section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, so as to render the amount of the premium recoverable by the respondent under subsection (5) of the same section. They do not dispute that if what was done on their behalf did amount to a contravention of section 2 (1), the amount of the premium can be recovered from them despite the fact that it was Pegasus which was the immediate recipient of the benefit of the respondent's concession.

Several points were taken by the appellants in the course of their argument to the effect that the prohibition contained in section 2 (1) did not apply to their ingenious transaction. The first was that, to be within the Act, the "premium" had to be paid to the landlord himself and not to any other person, so that, even if payment of a sum of money or its equivalent had been required in this case, it was not a premium within the meaning of the section. This reading was said, and I think rightly said, to have been adopted by the Divisional Court in *Rex* v. *Birmingham (West) Rent Tribunal*,[5] in which Lord Goddard C.J. said:

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[5] [1951] 2 K.B. 54, 58, 59.

"In the present case I prefer to base my judgment on the proposition that, on its true construction, this Act was intended to apply only to a pecuniary consideration paid to the landlord."

In my opinion that is not the right construction of the Act. The words of the section do not require that the prohibited payments should be only those made to landlords themselves. So far as the tenant is concerned, the cost of accommodation is raised against him just as much if he hands his money over to someone else as it is if he hands it directly to the landlord. The landlord, on the other hand, gets his benefit out of the tenant if the premium is paid at his order to his creditor, to his son or to any other person or purpose he nominates no less than if he receives what is paid directly into his own hands. I think, therefore, that there is a breach of section 2 when the premium is paid to a third party, provided that the payment is made at the landlord's direction.

Then it was said that, even if this might have been the right construction before 1951, it would be wrong to adopt it now after the *Birmingham* decision[6] had stood for eight years, particularly as a breach of the section had certain penal consequences. The Court of Appeal were not moved by this form of argument, and I cannot say that I am. I dare say that since 1951 some landlords have taken tribute of this kind in reliance upon what was said in the *Birmingham* case.[6] For all I know, Messrs. Clifford and Clifford Ltd., the agents of the appellants, had the relevant volume of the Law Reports open on the table before them when they laid down their condition that Pegasus was to have the respondent's house at £500 below its value. I should not be much surprised. But, after all, the primary duty of the House is to attribute what it believes to be the right meaning and effect to a general Act of Parliament passed for the protection of tenants of rent-controlled premises, and I do not think that we should ever get very far if a decision of a Divisional Court were to be treated as settling an important point of interpretation for all time merely because it was given eight years ago.

The next points that were taken were that the benefit conferred on Pegasus by the conveyance of the house for £1,800 was not a premium, that no payment had been made in the mere conveyance at an undervalue, and that the consideration which the sacrifice of £500 represented was not a pecuniary consideration within the meaning of section 18 (2) of the Act. All these

[6] [1951] 2 K.B. 54.

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aspects of the argument can be presented separately: but I have put them together because, in my view, they all depend on the answer given to the one question: Was there a "pecuniary" consideration afforded in this case? If there was, then it was by virtue of section 18 (2) a "premium": and, if it was a premium, then I should find no difficulty in saying that whatever passed it over to the recipient was a payment of it.

The expression "premium" includes any fine or other like sum, and any other pecuniary consideration in addition to rent. Not every consideration given or suffered to obtain a letting is then a premium for the purpose of this Act. It must be pecuniary. On the other hand, the term "premium" evidently extends to considerations beyond the simple lump sum in addition to rent which is the ordinary form of premium or fine. The appellants suggest that the words "pecuniary consideration" are satisfied by including in "premium" monetary instruments such as cheques and bills. In my opinion, that is not a natural interpretation, and, in any event, it is much too restricted. Judging by the context of the Act, there is, I think, a pecuniary consideration whenever the benefit obtained by the landlord or the detriment suffered by the tenant is expressed in terms of money. If it is so expressed, the particular means adopted of passing the consideration from giver to taker is not significant.

Now, in this case I do not think that there is any doubt that on the facts found by the county court judge what was required of the prospective tenants on behalf of the landlords was the sum of £500, to be taken out of the value of the house that they were to make over to Pegasus. The transaction was in all respects equivalent to what would have taken place if they had sold 174, The Heights, at its agreed fair market value of £2,300/£2,400 and handed back £500 to the purchaser. If that had been done, £500 would have been paid in cash at and to the order of the landlords. Although we must take the words of the statute as we find them, and we are not to treat "pecuniary consideration" as a mere synonym for any consideration whatsoever, I do not think that the distinction between what is and what is not "pecuniary" depends upon purely formal differences in the method of transferring the stipulated amount. What is important is that the landlords made it plain that their price was £500, and that this sum was furnished out of the resources of the tenant, which were reduced by the same amount.

I would dismiss the appeal.

LORD COHEN. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree. On the first point, whether we find here a "premium," I proceed upon the construction of the definition of "premium" in section 18 (2) of the Act. Some meaning must be found for the words "other "pecuniary consideration" in the definition, other than payment in cash. Payment in cash to a landlord is met by the words "any fine or other like sum." It was suggested that "any other "pecuniary consideration" would include payment by cheque. That would lead nowhere because, unless the cheque was honoured, there would be no payment at all and, if it were honoured, there would be a payment in cash if the cheque were cashed and, in effect, a payment in cash if it resulted in a transfer of credit from the drawer's bank account to the payee's bank account. I cannot think that the definition was introduced to cover fine distinctions of this kind. In my opinion, the phrase "any other pecuniary consideration" is apt to cover any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of forgoing a receipt of money. Forgoing a debt due by the landlord to the tenant would be a case in point. The difficulty arises, I think, not in giving the phrase such a construction, but from the fact that in section 2 of the Act "premium" is linked with the word "payment." Can a tenant be said to have *paid* a premium if he has agreed to discharge a debt due to him by the landlord? I would say "Yes." If such discharge is a pecuniary consideration he has satisfied the landlord's demand for a premium by agreeing to the discharge, and such satisfaction in the context of this Act is, in my opinion, equivalent to payment.

There remains the question whether the payment of a premium must be to the landlord. This links up in some measure with the definition of "premium." It cannot be in all respects so confined, for section 2 (2) of the Act prohibits any person from requiring payment of a premium as a condition of the assignment of a tenancy. This would apply, I think, to a landlord whose consent was necessary to an assignment, but it clearly covers a tenant who demands a premium as a condition of assigning his tenancy. This, however, is the result of express statutory enactment and may be said to assimilate the position of an assignor to that of a landlord. This leaves unresolved the question whether the payment required to be made must be made to the landlord (or the assignor), or to someone on his behalf, in order to constitute a breach of the statute. The matter must depend on what is to be implied from the language used. No express words refer to payment to the landlord. Reliance was placed by counsel for the appellants on the words " in addition to the rent " in section 2 (1) and " in addition to rent " in the definition. In the definition the words are probably necessary as, without them, the words " any " other pecuniary consideration " would, if taken literally, include rent. From the words in section 2 (1) no safe inference can, in my opinion, be drawn. On any view, the premium is in addition to the rent. Nor is the fact that the premium may be recoverable from the landlord, under section 2 (5), or may be ordered to be repaid by the landlord under section 2 (6) conclusive on the point. (It is immaterial to this case to consider whether it can be recovered from the recipient of the premium.) If the landlord is the person who has required the premium to be paid as a condition of his granting a tenancy, to whomsoever it is to be paid, section 2 (6) of the Act empowers the court which convicts him of an offence to order the premium to be repaid to the person by whom it was paid. By parity of reasoning subsection (5) of section 2 would seem to provide that it should be recoverable from the landlord by civil suit, in like case, without that subsection yielding a necessary inference that, therefore, it must have been received by him. As the Master of the Rolls said in his judgment in the Court of Appeal,[7] there is no logical reason why a payment made to the landlord should be recoverable as being unlawful and one made by his order to a son, or a trustee, or an associated company, should be protected as being lawful. In my opinion, this second point taken for the appellants falls with the first.

I would dismiss the appeal.

Lord Jenkins. My Lords, I also agree.

In this case the plaintiff (now respondent), William Alfred White, sued the defendants (now appellants), Elmdene Estates Ltd., in the Willesden County Court for £500, claiming that in the circumstances hereinafter mentioned the defendants had, within the meaning of sections 2 (1) and 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, required the payment of a premium of that amount in addition to the rent as a condition of the grant to the plaintiff of a tenancy of a flat at No. 108, Welldon Crescent, Harrow, being a tenancy to which the Rent Restriction Acts, 1920 to 1949, applied; and that he was, accordingly, entitled to recover from the defendants the sum in question (which he had, in fact, paid in the way I am about to describe) as an unlawful premium under the provisions of section 2 (5) of the Act of 1949.

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[7] [1960] 1 Q.B. 1, 17; [1959] 3 W.L.R. 185; [1959] 2 All E.R. 605.

The facts as found by the learned judge, which are not in dispute, have been fully stated in the opinion delivered by my noble and learned friend, Lord Simonds, and I need not repeat them at length. He has also sufficiently referred to the relevant provisions of the 1949 Act, which, for the purposes of this opinion, may therefore be taken as read.

The defendants admit that the tenancy of the flat was a tenancy to which section 2 of the Act of 1949 applied, and that, if the defendants had required and received a simple payment by the plaintiff to the defendants themselves of £500 in cash as a condition of granting the tenancy, the £500 would have been an unlawful premium under section 2 (1) and recoverable as such under section 2 (5).

The defendants did not, however, require or receive the £500 in actual cash; but they did require as a condition of the grant of the tenancy that the plaintiff and his wife should sell a house (No. 174, The Heights, Northolt Park), of which they were joint owners, at a price of £500 less than its fair market value. In compliance with this requirement the plaintiff and his wife in fact sold the house, not to the defendants themselves, but, by the direction of the defendants, to another company, Pegasus Training Estates Ltd. (hereinafter called "Pegasus"), at the stipulated undervalue.

The plaintiff's contention was that the benefit secured by the defendants by means of the sale at an undervalue of £500 constituted a premium of that amount within the meaning of sections 2 (1) and 18 (2) of the Act of 1949, and that, for the purposes of section 2 of that Act, the completion of such sale amounted to payment of such premium. He contended further that the fact that the defendants chose to require that the sale should be made to Pegasus instead of being made to themselves was irrelevant.

The defendants, on the other hand, contended that the benefit arising from the sale of the house at an undervalue of £500 was not a "premium," either in the ordinary sense of the word or within any of the wider meanings assigned to it by section 18 (2). They contended further that, even if a benefit of this sort was otherwise capable of constituting a premium within the meaning of the Act of 1949, the benefit here in question was outside the scope of section 2 (1) of the Act, which only applied to a premium paid to the person granting the tenancy, whereas in the present case, the payment constituted by the completion of the sale of the house at the stipulated undervalue was made, not to the defendants as the landlords, but to a third party, namely, Pegasus.

The learned county court judge, in the course of his careful and most helpful judgment, said that if the sale of the house had been to the defendants he would have been prepared to hold that the sale at an undervalue amounted to a premium within the meaning of that word as defined by section 18 (2) of the Act of 1949. He went on to observe, and I entirely agree, that "it would be very "odd if a proposed landlord could say to a proposed tenant 'you "'can have a tenancy but only on the terms that you sell me "'your wife's necklace, which is worth £1,500, for £1,000,' without it being held that that was a pecuniary consideration in "addition to the rent."

Later in his judgment the learned judge said this: "I "certainly held, however, that the payment, if it was a payment, "was made to Pegasus at the direction of or on the request of "the defendants, and upon that finding it seemed to me that the "plaintiff had brought his case within the section. He had "proved to my satisfaction that the defendants had as a condition of granting a tenancy required the payment (to Pegasus) "of a pecuniary consideration in addition to the rent."

From these and other passages in the judgment of the learned judge it is plain enough that, if he had been free to do so, he would have had little hesitation in deciding the case in the plaintiff's favour. He was, however, confronted with the case in the Divisional Court of *Rex* v. *Birmingham* (*West*) *Rent Tribunal*,[8] in which the view was expressed that in order to constitute a premium within the meaning of section 2 (1) of the Act of 1949 the payment in question must be made to the landlord and not to some third party. The learned judge, though with some reluctance, felt (as I think quite rightly) that he was bound to follow this decision, with the result that the defendants were entitled to succeed on the second branch of their argument because the "payment" here in question was made to Pegasus and not to the defendants as landlords.

Accordingly, by his order dated October 29, 1958, the learned judge gave judgment for the defendants with costs.

[8] [1951] 2 K.B. 54.

In the Court of Appeal the case of *Rex* v. *Birmingham* (*West*) *Rent Tribunal*[8] was distinguished and, while held right on its own facts, was disapproved in so far as it contained observations to the effect that no sum could be a premium within the meaning of section 2 (1) of the Act of 1949 if it was paid to some nominee of, or to the order of, the landlord, instead of being paid to the landlord himself.

On the question whether the £500 provided by the sale of the house at an undervalue of that amount was, in other respects, a premium within the meaning of the Act of 1949, the Court of Appeal took the same view as the learned county court judge had expressed, but to which, in view of the *Birmingham* case,[8] he had felt unable to give effect, and held that it was such a premium.

Accordingly, it was held in the Court of Appeal that the undervalue of £500 amounted to a premium within the meaning of the Act of 1949, and that it was not excluded from the operation of the Act by the circumstance that the sale was made to Pegasus at the direction of, or on the request of, the defendants instead of being made to the defendants themselves.

The Court of Appeal also decided in the plaintiff's favour two subsidiary questions which were not pursued in this House, the first being whether the £500 could be recovered from the defendants in view of the fact that it had been received by Pegasus and not by the defendants themselves; and the second being whether in view of the fact that the plaintiff and his wife were joint owners of the house, and the wife was not joined as a co-plaintiff, the plaintiff could recover the whole of the £500 or only half of it.

Accordingly, on April 28, 1959, the Court of Appeal gave judgment allowing the appeal and directing judgment to be entered for the plaintiff for the sum named with costs. From that judgment the defendants have now appealed to your Lordships' House.

In his able argument for the defendants Mr. Scarman relied on the words " payment . . . in addition to the rent " in section 2 (1), and the reference to the " person by whom " the premium " was paid " in section 2 (5) and (6) as showing that the prohibition is confined to the actual payment of money, or to transactions equivalent or analogous to the actual payment of money, and contended that in the present transaction there was no actual payment of money or transaction equivalent or analogous to the payment of money. He did not succeed in making clear to me where the line was to be drawn once the criterion of actual payment in cash was abandoned. Moreover, the narrow construction he would place on the words "payment of any "premium" appears to me to attribute no effect to the words "any other pecuniary consideration" in the extended interpretation of the expression "premium" contained in section 18 (2). Mr. Scarman placed some reliance upon section 3 of the Act of 1949, which provides that excessive prices for furniture, etc., are to be treated as premiums, on the ground (as I understood his argument) that if the words "any other pecuniary consideration" were wide enough to cover the present transaction, they would also cover transactions of the kind contemplated by section 3, which would thus become otiose. I cannot attach any weight to this submission. Section 3 can well be accounted for as a provision made ex abundanti cautela to meet an obvious mode of evasion which might or might not otherwise be caught. Moreover, section 3 covers cases in which there has been no quantification by the parties of the reasonable price or the excess over that price, and in such cases it might well be difficult, in the absence of a special provision, to apportion the total price between purchase-money and premium. Mr. Scarman also traced through earlier enactments (beginning with the Act of 1915) the history of the prohibition of premiums now appearing in section 2 of the Act of 1949, and sought to spell out of various changes in the language in which it has been expressed from Act to Act the conclusion that it is now to be regarded as confined to actual payments in money, or to transactions involving something equivalent or analogous to actual payment in money. Having given the best consideration I can to this part of Mr. Scarman's argument, I find it impossible to justify by reference to the other enactments to which he has referred, the narrow meaning which he seeks to place upon the provisions of the Act of 1949, with the construction of which your Lordships are now concerned. Mr. Scarman also referred to cases under legislation in the reign of George III designed to prohibit or restrict the sale of life annuities, in which a narrow construction had been placed on the expression "pecuniary consideration." I can derive no assistance from the various cases referred to in the course of the argument as bearing upon the meaning of the words "premium," "fine," "pay" or "payment" in other contexts and other Acts.

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[8] [1951] 2 K.B. 54.

Returning to the language of sections 2 (1) and 18 (2) of the Act of 1949, it appears to me that the expression "pecuniary "consideration" must be intended to include benefits which

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would not or might not fall within the description of a premium or fine or other like sum. It appears to me further that given a benefit amounting to a " pecuniary consideration " moving from a prospective tenant to a prospective landlord, the " payment " of it must include any means appropriate to the subject-matter by which the consideration or benefit in question is passed from the one to the other.

Without attempting any exhaustive definition of the expression " pecuniary consideration," I may, at all events, safely say that the example given by my noble and learned friend, Lord Keith of Avonholm, of the forgoing of a debt owing to the prospective tenant from the prospective landlord would be within it, and that the cancellation of the debt would amount to payment of the " pecuniary consideration " in question, although no money actually passed.

In the present case the sale of the house at an undervalue was clearly consideration. It was, moreover, consideration which had a specific value in money, namely, £500, being the amount of the undervalue required by the defendants. On completion of the sale Pegasus, which became the purchaser at the direction or on the request of the defendants, gained, and the plaintiff lost, the £500. In short, the defendants required as a condition of granting the tenancy a consideration assessed at the sum of £500, which was to be provided by the sale of the house by the plaintiff and his wife at a price less by £500 than the price which could otherwise have been obtained for it, and directed or requested that the sale should be made to Pegasus instead of to the defendants. In these circumstances, I fail to see how the defendants could, with any semblance of truth, claim that they had not required a pecuniary consideration of £500, to be satisfied, or, in other words paid, by the sale of the house at an undervalue of that amount.

As to the *Birmingham* case,[9] I entirely agree with the Court of Appeal that it cannot be supported so far as it proceeds on the general proposition that no sum can, in any circumstances, be a premium within the meaning of the Act of 1949 unless it is paid to the prospective landlord. There may, of course, be cases in which prospective tenants, with a view to obtaining tenancies, make payments to persons other than the prospective landlords for some consideration other than the granting of the tenancies in view. Examples are to be found in the sums paid by prospective tenants to the builders who were converting the property into flats in the *Birmingham* case,[9] and in the sum paid to the sitting tenant to vacate the premises in *Remmington* v. *Larchin.*[10] Payments such as these might well be held to fall outside the category of premiums because they are not payments required as a condition of granting the tenancy.

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[9] [1951] 2 K.B. 54.

But if the payment in question is in fact required by the prospective landlord as a condition of granting the tenancy, I cannot see why the payment should be any the less a premium because the landlord chooses to stipulate that it should be made to a third party designated by him. Illegality apart, the landlord is master of the situation and can demand any payment he pleases to be made to himself or to any third party he may please to designate. He can decide to receive the payment himself and pay it over to any third party he chooses immediately after receipt, and the fact that he requires payment to be made directly to the third party of his choice cannot, so far as I can see, make any difference.

Mr. Scarman did not contend before your Lordships that if the pecuniary consideration here in question was not prevented from being a premium within the meaning of the Act by the circumstance that it was received by Pegasus at the direction or on the request of the defendants, instead of being received by the defendants themselves, that circumstance would prevent it from being recoverable from the defendants under section 2 (5).

For these reasons, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *J. H. Milner & Son; M. Phillips & Co.*

F. C.

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[9] [1951] 2 K.B. 54.

[10] [1921] 3 K.B. 404.

[HOUSE OF LORDS.]

SOCIETY OF MEDICAL OFFICERS OF HEALTH . . . . APPELLANTS;

AND

HOPE (VALUATION OFFICER) . . . RESPONDENT.

H. L. (E.)*

1959
Nov. 9, 10.

1960
Jan. 21.

Estoppel—Per rem judicatam—Rates and rating—Local valuation court —Decision in 1951 *that society be entered on current valuation list as exempt from rates under Scientific Societies Act,* 1843*—Same question arising in* 1956*—Scientific Societies Act,* 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1*—Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48.

Rates and Rating—Science or fine art—Exemption—Whether decision of local valuation court on requisite entry in one valuation list res judicata in relation to new valuation list—Whether local valuation court a court of competent jurisdiction—Whether dispute before local valuation court a lis inter partes—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1*—Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48.

Section 48 (4) of the Local Government Act, 1948, provides that, on appeal to a local valuation court, the court "shall give such "directions with respect to the manner in which the hereditament in "question is to be treated in the valuation list as appear to them "to be necessary to give effect to the contention of the appellant if "and so far as that contention appears to the court to be well "founded. . . ."

In 1951 a society made a proposal to delete from the current valuation list a hereditament occupied by it on the ground that it was exempt from payment of rates under section 1 of the Scientific Societies Act, 1843. The valuation officer objected. On appeal to the local valuation court for the area, the court decided that the hereditament was exempt under the Act of 1843, and directed that the list be amended to accord with that decision.

On April 1, 1956, a new valuation list came into force by virtue of statutory directions, and the society's hereditament was entered on that list with gross and rateable values. The society again made a proposal that it be exempt under the Act of 1843. The valuation officer objected. On appeal to the local valuation court for the same area, the court stated that they had in 1951 decided that the society was exempt, and in the absence of evidence adduced by the valuation officer of any variation in the society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act of 1843.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

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On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of res judicata:—

Held, that a decision of a local valuation court does not create an estoppel per rem judicatam when the valuation list which was the subject of the decision has come to the end of its statutory life and a new quinquennial valuation list has to be brought into existence, even when it is shown or agreed that there has been no change of circumstances.

The jurisdiction of the tribunal is limited, in that its function begins and ends with deciding the assessment or liability of a person for a terminable period.

Further, the position of a valuation officer is that of a neutral official charged with the recurring duty of bringing into existence a valuation list, and he cannot properly be described as a party so as to make the proceedings a lis inter partes.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155 (P.C.); 42 T.L.R. 207 distinguished.

Leith Harbour and Docks Commissioners v. *Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17 applied.

Reg. v. *Hutchings* (1881) 6 Q.B.D. 300; *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* [1926] A.C. 94 (P.C.); and *Inland Revenue Commissioners* v. *Sneath* [1932] 2 K.B. 362 (C.A.); 48 T.L.R. 241 considered.

Decision of the Court of Appeal [1959] 1 Q.B. 462; [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509 affirmed.

APPEAL from the Court of Appeal (Morris L.J. and Wynn-Parry J., Sellers L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated February 9, 1959, whereby an appeal by the appellants, the Society of Medical Officers of Health on a case stated by the Lands Tribunal (Erskine Simes Q.C.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, was dismissed, and the decision of the Lands Tribunal was affirmed. By its decision (given on April 14, 1958, on a preliminary point of law) the Lands Tribunal had refused to give effect to a plea of res judicata by the now appellants in answer to an appeal by the now respondent, S. G. Hope (Valuation Officer) from a decision of a local valuation court for North East London given on June 24, 1957.

The question raised by this appeal was whether or not a decision by a local valuation court, constituted under the Local Government Act, 1948, that a hereditament in London occupied by the appellants should be treated, by virtue of section 1 of the Scientific Societies Act, 1843, as exempt from rating in the valuation list in force in 1951 pursuant to the Valuation (Metropolis) Act, 1869, precluded the respondent from contending and the courts from holding that the hereditament should not be treated by virtue of the Act of 1843 as exempt from rating in the new valuation list which came into force on April 1, 1956, pursuant to section 34 of the Act of 1948 (as subsequently amended).

The question arose in connection with the making of the new valuation list for the St. Pancras rating area. The appellants occupied a hereditament at Tavistock House, Tavistock Square, situated in that area, and they objected to the entry of their hereditament in that list at a gross value of £300 and a rateable value of £247. Their objection took the form of a proposal made on September 25, 1956, to alter the list and called for the exclusion of the hereditament on the ground of "exemption from "payment of rates under the Scientific Societies Act, 1843." They contended that they were entitled to this exemption as a conclusion of law founded on the facts that (1) on October 24, 1951, the local valuation court decided and directed that the hereditament should be exempted from rating under the Act of 1843, and (2) there was no evidence to show any variation in the appellants' constitution or activities since 1951.

D. Tolstoy Q.C. and *H. S. A. Hart* for the appellants. The decision of the local valuation court in 1951 was a judgment in rem fixing the appellants' status and operated as an estoppel per rem judicatam between the parties so long as it is shown or agreed that the facts and circumstances relevant to the exemption remained unchanged. If there has been any material change of circumstances it is otherwise. In 1951 the local valuation court had sufficient jurisdiction to settle permanently questions of law between the parties themselves. If the contention for the respondent were right, the valuation officer could repeatedly challenge a valuation, thereby causing great inconvenience to the ratepayers. If there are two possible constructions of the relevant enactments one of which will not cause inconvenience or injustice, while the other will, the first should be adopted: see *Shannon Realties Ltd.* v. *Ville de St. Michel.*[1]

The plea of res judicata is a fundamental doctrine based on the view that there must be an end to litigation: see *Green* v. *Weatherill*[2] as to its effect as a matter of principle, and also *Badar Bee* v. *Habib Merican Noordin.*[3] The respondents relied on Lord Chelmsford's opinion in *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor*,[4] but in that case there were specialties which reduce the observations relied on rather to obiter dicta: see *per* Lord Cranworth L.C.[5] Moreover, Lord Chelmsford's view [6] that the doctrine was inapplicable if the cause of action was different has not been accepted: *Humphries* v. *Humphries*.[7] The appellants rely on *Hoystead* v. *Commissioner of Taxation*,[8] where estoppel per rem judicatam was successfully asserted against the taxing authority in respect of an assessment for the year 1920–21 because of a judgment on a case stated relating to an assessment for the year 1918–19, because the subject-matter was the same but in respect of later years: see *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[9] It establishes that where a question has been decided by a court of competent jurisdiction in a lis inter partes, those parties are estopped from reopening the same question in subsequent proceedings between themselves.

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[1] [1924] A.C. 185, 192–193 (P.C.).

[2] [1929] 2 Ch. 213, 221; 45 T.L.R. 602.

[3] [1909] A.C. 615, 622–623 (P.C.).

The decision of special commissioners does not create an estoppel, because the commissioners are not a court of competent jurisdiction, so that *Inland Revenue Commissioners* v. *Sneath* [10] and *Patuck* v. *Lloyd*,[11] relied on by the respondents, are not relevant. Likewise, valuation committees were not in any sense properly courts: see Encyclopaedia of the Laws of Scotland, vol. XV, p. 364, para. 781, citing *M'Gilvray* v. *Oban Assessor*.[12] *Smith* v. *Argyllshire Assessor* [13] is no authority against the appellants, nor is *Lamont* v. *Dumfriesshire Assessor*.[14] In any case, both are distinguishable, being only concerned with estimates of value.

As to the principles governing estoppels, see *Inland Revenue Commissioners* v. *Brooks*,[15] *Reg.* v. *Hutchings*,[16] *North Eastern Railway Co.* v. *Dalton Overseers* [17] and *Wakefield Corporation* v.

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[4] (1866) L.R. 1 Sc. & Div. 17, 22–23.

[5] Ibid. 21–22.

[6] Ibid. 23.

[7] [1910] 1 K.B. 796; [1910] 2 K.B. 531 (C.A.).

[8] [1926] A.C. 155, 161 (P.C.); 42 T.L.R. 207.

[9] [1939] A.C. 1, 36, 41–42 (H.L.); 55 T.L.R. 260; [1938] 4 All E.R. 747.

[10] [1932] 2 K.B. 362, 369, 370, 378, 379–380, 384–385, 388 (C.A.); 48 T.L.R. 241.

[11] (1944) 171 L.T. 340 (C.A.).

[12] 1916 S.C. 665.

[13] (1885) 12 R. 905.

[14] (1900) 2 F. 610.

[15] [1915] A.C. 478, 483, 485 (H.L.); 31 T.L.R. 89.

[16] (1881) 6 Q.B.D. 300, 301 et seq. (C.A.).

[17] [1898] 2 Q.B. 66, 73; 14 T.L.R. 421; [1899] 1 Q.B. 1026, 1029 (C.A.); 15 T.L.R. 346; [1900] A.C. 345, 357 (H.L.); 16 T.L.R. 419.

Cooke.[18] The present case falls rather on the *Wakefield*[18] side of the line than on that of the *Hutchings* case.[19]

But the local valuation courts have all the attributes of a court and are courts of competent jurisdiction: see section 48 (4) of the Local Government Act, 1948, and regulation 11 of the Rating Appeals (Local Valuation Courts) Regulations, 1949 (S.I. 1949, No. 2312). See also section 50, which provides for arbitration as an alternative to a decision by a local valuation court. It is conceded that, if the appellants are right and estoppel operates, a wrong decision must continue to be binding unless it is set right by Act of Parliament: *In re Waring*.[20]

Since 1951 the appellants have gone on just as they did before. In 1951 there was a finding in their favour that on the facts as they then stood the appellants came within section 1 of the Act of 1843, and there are admissions (which are equivalent to evidence) that since 1951 the circumstances have not changed. Thus the matter falls within the principles of the law of estoppel which require that, starting with a particular decision, one should establish that the facts are no different now from what they were at the time of the decision. If it were otherwise, res judicata would never operate.

As to the effect of valuation lists, see section 45 (1) of the London County Council (General Powers) Act, 1949 (12 & 13 Geo. 6, c. lv).

As to estoppel in rem and estoppel in personam, see *Reg.* v. *Hartington Middle Quarter*.[21] The appellants would still be entitled to hold this decision as res judicata even if the same point were to be decided otherwise in another case in a superior court: see *In re Waring*.[22] As to the effect of a previous decision delivered between the same parties, see *Vernon* v. *Inland Revenue Commissioners*.[23] Once a matter comes before a court of competent jurisdiction in a lis inter partes the decision gives rise to an estoppel for the future: see *Sneath's* case[24] as to when a lis comes into existence.

Assuming that there is here a decision of a court of competent jurisdiction, the question was the same in 1956 as in 1951. The decision in 1951 was that the appellants fell within section 1 of

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[18] [1903] 1 K.B. 417 (C.A.); 19 T.L.R. 217; [1904] A.C. 31, 33–34 (H.L.); 20 T.L.R. 119.

[19] 6 Q.B.D. 300.

[20] [1948] Ch. 221; 64 T.L.R. 147; [1948] 1 All E.R. 257.

[21] (1853) 4 E. & B. 780, 794.

[22] [1948] Ch. 221.

[23] [1956] 3 All E.R. 14, 19; 36 T.C. 484, 495.

[24] [1932] 2 K.B. 362, 386.

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the Act of 1843. So far as construction of their constitution is concerned, reliance is placed on the *New Brunswick* case.[25] So long as their constitution remains the same, its construction has been decided. The constitution and the facts are still the same. The mere passage of time does not change that.

If in 1951 a court holds that A is a British subject, and if there is no change of circumstances in 1956, then the doctrine of estoppel operates. If it did not the matter could be reopened and reinvestigated. So, too, if in 1951 a building is held to be a dwelling-house, and there is evidence in 1956 that there has been no change of circumstances, a court could not reinvestigate the matter. If in 1951 a man was held to be a bachelor, then, even if he was not, estoppel would operate if it could be shown that his circumstances had not changed. A decision can create an estoppel as to ownership of land if the circumstances have not changed: see *Long* v. *Gowlett.*[26] See also *Hoystead's* case [27] and *Whittaker* v. *Jackson.*[28]

Here it would be essential to show a change of circumstances since 1951 in order to prevent estoppel: see *Tarr* v. *Cory Brothers & Co. Ltd.*[29]

In summary, in 1951 there was a finding that the appellants' constitution and activities came within section 1 of the Act of 1843 and gave them the status of a society within that section. That decision was one by a court of competent jurisdiction, the local valuation court. In 1956 it was proved by evidence on admissions that the appellants' circumstances and activities had undergone no change since 1951. That created an estoppel. The question in 1956 was in one sense different in that it was how it was to be treated in the 1956 valuation list, not the 1951 list; but the substantial question, which is the same, is whether the appellants' constitution and activities bring them within section 1 of the Act of 1943.

Maurice Lyell Q.C. and *Patrick Browne* for the respondent. The respondent relies on four propositions:

(1) The question to be litigated in 1956 was not the same as that litigated in 1951.

(2) There was not in 1951 any decision, whether final or not. as to the matter which fell to be litigated in 1956, which was to find the answer to the question: What entry was to be made in the valuation list in 1956?

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[25] [1939] A.C. 1, 43.
[26] [1923] 2 Ch. 177, 180, 193.
[27] [1926] A.C. 155, 166.
[28] (1864) 2 H. & C. 926.
[29] [1917] 2 K.B. 774, 777, 780, 782–783 (C.A.).

(3) There was no litigation in the Land Valuation Court, because the sole object of the valuation list, as shown by its name, is to establish values for the hereditaments which appear in the list.

(4) The statutory duty on the valuation officer is to make a new valuation list at quinquennial intervals. That duty cannot be overridden by estoppel.

In 1951 the local valuation court had to consider the facts relating to the hereditament in relation to the proposal. In 1956 it had to consider the facts relating to the hereditament at the date of the later proposal; these were different facts. The local valuation court which decided in 1951 how the hereditament was to be treated in the valuation list then in force had no jurisdiction to decide how it should be treated in the new valuation list. There are here two sets of independent facts and, although they may appear to be identical, no estoppel by way of res judicata can arise: see the *New Brunswick* case.[30] In 1951 and 1956 the facts were different. The time factor is essential and at the two hearings it was impossible that it should be the same question. That is in accordance with all the rating authorities with the exception of *Hoystead's* case.[31] See *North Eastern Railway Co.* v. *Dalton Overseers*,[32] where it was held that there was no estoppel and a fresh rate was made. *Hoystead's* case[33] was wrongly decided, in that, although the decision was right on the matters which were argued, a ground for resisting the appeal which, if taken, should have succeeded was not taken by counsel for the respondent, that is, that the 1920–21 assessment was a new subject-matter in relation to the 1918–19 assessment. The assumption that if this point had then been argued it would have been decided as the appellants contend runs counter to all the other decisions. See also *Edwards* v. *"Old Bushmills" Distillery Co. Ltd.*,[34] *Patuck* v. *Lloyd*[35] and *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*,[36] which was decided in the Privy Council shortly before *Hoystead's* case.[37]

In the *Leith Harbour* case[38] what Lord Chelmsford said was assented to by Lord Kingsdown, and his observations on estoppel were as much part of the ratio decidendi as the rest. Estoppel is a rule of evidence. The fact that a man was the owner of an estate in 1951 does not prove that he was the owner in 1956; he must prove that he has not alienated it.

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[30] [1939] A.C. 1, 37, 41, 43.

[31] [1926] A.C. 155.

[32] [1898] 2 Q.B. 66; [1899] 1 Q.B. 1026 (C.A.); [1900] A.C. 345 (H.L.).

[33] [1926] A.C. 155.

[34] (1926) 10 T.C. 285, 287, 299 (H.L.).

[35] 171 L.T. 340, 341.

[36] [1926] A.C. 94 (P.C.).

[37] [1926] A.C. 155.

[38] L.R. 1 Sc. & Div. 17.

The statutory duty of the valuation officer at each quinquennium carries with it the duty to act according to law. He holds the scales between the rating authority and the ratepayer, making proper entries in the valuation list, according to law. Any other ratepayer may be a person aggrieved by an entry in the valuation list: see section 40 (1) of the Local Government Act, 1948. When a statute imposes a positive duty for the benefit of the public, an estoppel cannot be set up to prevent it: *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[39] To give effect to the appellants' contentions would have the effect pro tanto of repealing the provisions of the Act of 1948, because pro tanto the valuation list would not be properly made. What was said in *Inland Revenue Commissioners* v. *Brooks* [40] was right. It indicates that here the previous decision should not stop the valuation officer from drawing up a new valuation list according to law. This is not a field where one can get into the atmosphere of estoppel.

To the extent that there was here a court of competent jurisdiction, there was a lis, but it was not a lis inter partes. The valuation officer is not a party. He is there merely to see that a correct result is reached: see *Sneath's* case.[41]

D. Tolstoy Q.C. in reply. As to the *New Brunswick* case,[42] note should be made of what Lord Romer said there.[43] Here one is dealing with one and the same document, the constitution of the appellants, and not, as in that case, with different documents. As to *North Eastern Railway Co.* v. *Dalton Overseers*,[44] there was nothing in the relevant sections there similar to sections 40 and 48 of the Act of 1948. There is nothing similar in the Poor Rate Act, 1801. That case is distinguishable: see *per* Wills J. What was said in *Sneath's* case [45] was not inconsistent with *Hoystead's* case [46] being right. As to *Edwards* v. *"Old Bush-"mills" Distillery Co. Ltd.*,[47] what was there said by Viscount Cave L.C. would itself prevent estoppel from arising. As to the *Maritime Electric* case,[48] that case dealt with estoppel by conduct and it was held that such estoppel could not be set up in face of a duty under a statute, but here the estoppel arises from the decision of a court.

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[39] [1937] A.C. 610, 620 (P.C.); [1937] 1 All E.R. 748.

[40] [1915] A.C. 478, 491–492.

[41] [1932] 2 K.B. 362, 382.

[42] [1939] A.C. 1.

[43] Ibid. 43.

[44] [1898] 2 Q.B. 66; [1899] 1 Q.B. 1026 (C.A.); [1900] A.C. 345 (H.L.).

[45] [1932] 2 K.B. 369, 379–380, 386.

[46] [1926] A.C. 155.

[47] 10 T.C. 283, 289.

[48] [1937] A.C. 610.

Their Lordships took time for consideration.

Jan. 21, 1960. Viscount Simonds. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Radcliffe, is about to deliver. I agree so fully, both in his reasoning and conclusions, that I do not think it necessary to add anything further. I shall content myself with moving in due course that the appeal be dismissed.

Lord Radcliffe. My Lords, the only question raised by this appeal concerns the application of the principle of estoppel per rem judicatam to the making of a new valuation list for the St. Pancras, London, rating area in accordance with the provisions of the Local Government Act, 1948. The appellants occupy a hereditament at Tavistock House, Tavistock Square, situated in that area, and their objection is to the entry of their hereditament in the new valuation list which came into force on April 1, 1956, at a gross value of £300 and a rateable value of £247. Their objection, which takes the form of a proposal to alter the list, calls for the exclusion of the hereditament on the ground of "exemption "from payment of rates under the Scientific Societies Act, 1843." They may, indeed, be entitled to such exemption if they bring themselves within the conditions required by section 1 of that Act: but hitherto they have been maintaining in their successive appeals to the local valuation court, the Lands Tribunal, the Court of Appeal and now to this House that they are entitled to this exemption as a conclusion of law founded on the facts (1) that in 1951 they obtained a decision from the then local valuation court that the preceding valuation list, now expired, should be altered so as to give effect to their exemption from rating by virtue of the Scientific Societies Act, and (2) that neither their circumstances nor their purposes have altered since that date.

This particular plea was argued as a preliminary point when the appeal was before the Lands Tribunal and so it remains. It became possible to deal with it in this way, and thus to postpone any inquiry into the actual current situation of the appellants, because the respondent had formally intimated to the local valuation court, before they decided upon the appellants' proposal, that he did not contend that any alteration had been made in the constitution of the society since the earlier decision of the local valuation court in 1951, and did not suggest that the society now carried on activities which it did not then carry on. What he wished to rely on were the present constitution of the society and its present activities. The setting up of a preliminary point in this way seems a somewhat elaborate procedure: but the result is that, if the plea of estoppel does not commend itself to your Lordships' House, as it has not to the Lands Tribunal or to the majority of the Court of Appeal, the case will have to go back to the Lands Tribunal for adjudication on its merits, whatever they may be.

It is necessary now to state a few matters of fact to show the context in which this alleged estoppel arises. The Scientific Societies Act, 1843, as is well known, gives exemption from rates in respect of any hereditament, if (1) it belongs to a society instituted for purposes of science, literature or the fine arts exclusively; (2) it is occupied by the society for (a) transacting its business, and (b) carrying into effect its purposes, and if the society (3) is supported, at any rate in part, by voluntary contributions, and (4) does not make distributions of money among its members, and (5) obtains a certificate, as prescribed, from a barrister-at-law or the Lord Advocate. Exemption, therefore, depends upon the combination of a set of facts, most of which are capable of variation from year to year, and the absence of any one of which destroys the privilege of immunity from rates. I note this because the foundation of the appellants' argument for an estoppel lay in the proposition that the decision of the local valuation court in 1951 was a decision as to the society's "status." To my mind, that would be an inappropriate description of the nature of such a decision, and it would not become any the more appropriate because, on a particular subsequent occasion, the valuation officer agreed or did not oppose a claim that the relevant purposes and circumstances had not altered.

In 1951 the valuation list in force in the St. Pancras rating area was the last valuation list made under the Valuation (Metropolis) Act, 1869. The procedure followed when the appellants made their proposal to delete their hereditament from the list was that laid down by the Local Government Act, 1948. The valuation officer objected to their proposal and the resulting appeal came before a local valuation court for North East London, whose function is (section 44 (1)) the "hearing and determining "appeals . . . against objections to proposals for the alteration "of valuation lists." The valuation officer appeared as a party on the hearing of the appeal, as he was entitled to do (section 48

(3)) and the court, after hearing the parties, then gave its decision in favour of the exemption claimed. In doing so, it acted under the authority conferred on it by section 48 (4), which runs as follows: "After hearing the persons mentioned in the last preceding subsection, or such of them as desire to be heard, the "local valuation court shall give such directions with respect to "the manner in which the hereditament in question is to be "treated in the valuation list as appear to them to be necessary "to give effect to the contention of the appellant if and so far "as that contention appears to the court to be well founded, and "the valuation officer shall incorporate in the list as settled, or, "as the case may be, cause to be made in the list, such altera-"tions as are necessary to give effect to those directions." No appeal against the decision was made by the valuation officer.

Now, does that decision create an estoppel per rem judicatam when the valuation list that was the subject of the decision has come to the end of its statutory life, and a new quinquennial valuation list has to be brought into existence to fulfil the requirements of the relevant Act of Parliament? Obviously not, both parties agree, if there has been any material change of circumstances in the meantime: but "Yes," the appellants say, if it is shown or agreed that there has been no change of circumstance.

The principles of law governing estoppel per rem judicatam inter partes are generally repeated in the form derived from the words of de Grey C.J. in the *Duchess of Kingston's Case*[1] and quoted by Lord Selborne L.C. in *Reg.* v. *Hutchings*[2]: ". . . the "judgment of a court of concurrent" (or of exclusive) "jurisdic-"tion, directly upon the point, is conclusive . . . between the same "parties coming incidentally in question in another court for a "different purpose. But neither the judgment of a concurrent or "exclusive jurisdiction is evidence of any matter which came col-"laterally in question, though within their jurisdiction; nor of "any matter incidentally cognisable, nor of any matter to be "inferred by argument from the judgment." Other authorities have added the requirement that there must be a lis inter partes for the judgment to proceed upon, and that the court must be a court "of competent jurisdiction that has seisin of the case for "the purpose of reaching a final decision inter partes": see *Inland Revenue Commissioners* v. *Sneath*.[3]

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[1] (1776) 20 St.Tr. 355, 538n.

[2] (1881) 6 Q.B.D. 300, 304 (C.A.).

[3] [1932] 2 K.B. 362, 380–381 (C.A.); 48 T.L.R. 241.

My Lords, the words themselves may be plain but they involve several distinctions that are far from clear. What is direct and what collateral or incidental? By what test is the matter the same or different? When are the parties the same and what are the determining marks of a party or a lis for this purpose? To take only the instance of the present case, certainly the local valuation court is a court of competent jurisdiction able to give a final decision of some sort between those who appear before it: but then the question arises, for what decisions is it a court of competent jurisdiction, and do they or can they extend beyond the range of the form and contents of the current valuation list? Again, the valuation officer is no doubt a party to a controversy between himself and the complainant: but, having regard to his statutory function and duties, including that of preparing the new valuation list, and to the interests of the whole body of ratepayers from time to time in the contents of the list, is this controversy a lis or is he a party for the purpose of the principles of estoppel per rem judicatam?

I do not think that it is possible to discuss the point raised by the present appeal simply in terms of these general phrases, or without giving full weight to the fact that what is in question is the conclusiveness for liability to one rate of a decision given with regard to another. The system of rating involves certain considerations that are special to itself. Its nearest analogy is with the system of annual personal taxation. With regard to both one has to begin by recognising that there is high and frequent authority for the proposition that it is not in the nature of a decision given on one rate or tax that it should settle anything more than the bare issue of that one liability and that, consequently, it cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for adjudication. The question of this liability is a "new question." It is not "eadem quaestio." The "cause of action is different." "The subject-matter is a different year's tax and a different "year's assessment and is not the same as the subject-matter "of the previous ruling." All these things have been said with reference to rates or taxes, and the list of decisions that recognise or enforce the principle is a long one: see *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor*[4]; *North Eastern*

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[4] (1866) L.R. 1 Sc. & Div. 17.

Railway Co. v. *Dalton Overseers*,[5] *per* Wills J.; *Scott* v. *Lowe*[6]; *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*[7]; *Inland Revenue Commissioners* v. *Sneath*[8]; *Patuck* v. *Lloyd*,[9] *per* Lord Greene M.R.

It would not be at all easy for us to depart from this long line of authoritative opinion, even if we wanted to. Personally, I do not want to, because I think that, on the whole, it is more in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result some expectations may be frustrated and some time wasted.

To say that the issue of liability to one year's rate is not the same subject-matter as the issue of liability to another year's, or that the one cause of action is different from the other is, perhaps, rather an arbitrary way of disposing of the appellants' case. There are legal contexts, in trespass or recurring claims for rent, for example, in which much the same might be said and yet it is not impossible for an estoppel to arise. The reason why, when you are dealing with rates and taxes, the difference of subject-matter is treated as being so important seems to lie in two considerations which, as I read the authorities, are peculiar to their particular field.

One consideration is that the jurisdiction of the tribunal to which the decision belongs by the administrative scheme is a limited one. It is limited in the sense that its function begins and ends with that of deciding what is to be the assessment or liability of a person for a defined and terminable period. "The "assessment seems inherently to be of a passing nature." For the purpose of arriving at its decision the tribunal may well have to take account of, and form its own opinion on, questions of general law; it may even have necessarily to consider one or more of such questions: but in either case the view adopted with regard to them is incidental to its only direct function, that of fixing the assessment. For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it: but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the estoppel per rem judicatam that arises in certain contexts from legal judgments. It seems to me to be entirely congruous with this conception of the functions of a local valuation court and their inherent limitation that the Local Government Act, 1948, should express its power to make decisions in the words that I have already quoted from section 48 (4): " . . . the "local valuation court shall give such directions with respect to "the manner in which the hereditament in question is to be "treated in the valuation list as appear to them to be necessary "to give effect to the contention of the appellant if and so far as "that contention appears to the court to be well founded."

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[5] [1898] 2 Q.B. 66, 73–74; 14 T.L.R. 421; (C.A.) [1899] 1 Q.B. 1026; 15 T.L.R. 346; (H.L.) [1900] A.C. 345; 16 T.L.R. 419.

[6] (1902) 86 L.T. 421.

[7] [1926] A.C. 94, 100 (P.C.).

[8] [1932] 2 K.B. 362.

[9] (1944) 171 L.T. 340, 341 (C.A.).

I take it that the point of view which I have been expressing forms the real significance of the judgment of Lord Selborne L.C. in *Reg.* v. *Hutchings*,[10] to which reference is so often made. In that case a local board under the Public Health Act, 1875, had applied to justices in petty sessions for an order against a frontager for payment of a share of the expenses of sewering a street. The application was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. Some years later another application was made by the same board for an order for payment of a share of paving expenses. It was decided by the Court of Appeal that the frontager could not rely upon a plea of estoppel against the board, precluding it from asserting that the street was not repairable by the inhabitants at large. "I am of opinion that there was in "law no estoppel," said Lord Selborne,[11] " . . . I think so, "because of the nature of the liability in question, and the nature "and limits of the summary jurisdiction which the justices "exercised . . . " Then, later on, he said [12]: "The justices, "before whom the complaint of the urban authority came . . . "had no jurisdiction to adjudicate directly or immediately "between these parties (or between any parties whatever) on "the question whether Mill Street was or was not a highway "repairable by the inhabitants of Bradford at large. That was, "at the most, a matter 'incidentally cognisable' by them. No "conclusion which they might form upon it could establish (in "the one case) or disprove (in the other) any such liability, as "against or in favour of the inhabitants. Their only jurisdiction "was to make or refuse the order for payment of a certain sum "of money, then claimed as the defendant's statutable quota of "certain expenses, at that time incurred by the urban authority."

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[10] 6 Q.B.D. 300.

[11] Ibid. 303.

[12] Ibid. 305.

When the respondent in this appeal advances the reason: "Because the local valuation court which decided in 1951 how "the said hereditament was to be treated in the valuation list "then in force had no jurisdiction to decide how it should be "treated in the new valuation list," this is, of course, a truism. But then I do not think that anyone is contending that it had just that jurisdiction. What is said is that in 1951 it had sufficient jurisdiction to be able to settle, permanently, questions of law as between the parties themselves: and that jurisdiction, in my opinion, it did not possess.

The other main consideration which has influenced the courts in their treatment of these questions is the special position of the valuation officer, surveyor or equivalent official or committee. This reflects upon the propriety of using the words "*party*" or "*lis inter partes*" in this connection. It will be shorter to limit attention to the case of rating, though a study of the judgments of the Court of Appeal in *Sneath's* case [13] will show how closely parallel are the arguments that develop with regard to a surveyor or inspector of taxes. However that may be, the position of the valuation officer in rating is that he is a neutral official charged with the statutory and recurring duty of bringing into existence a valuation list and maintaining its contents in correct and legal form. He has, of course, no personal interest when he appears before the local valuation court: nor would it be correct to say that he represents the rest of the ratepayers other than the complainants. It is in the nature of the rating scheme that all those other ratepayers, a body of persons varying from year to year, are interested in the valuation or exemption allotted to any single hereditament on the list. Indeed, we were reminded by counsel that at the time of the 1951 decision there was no bar to any ratepayer, as a person aggrieved, raising an objection to the alteration of the list consequent upon that decision and asking for his objection to be heard. Some statutory limitation has since been placed upon this right of objection, the details of which I have not checked, because its existence is only significant as illustrating how inappropriate are the general circumstances of rating procedure to the importation of the legal doctrine of estoppel per rem judicatam into its ordinary administration. It is no reflection upon the responsible work carried out by the local valuation courts if I say that they are not the natural repositories of the right to decide for good such legal issues as the interpretation of statutes or general legal questions affecting ratepayers: and to hold that, subject to appeal, such decisions are to be treated as conclusive for all time would be, in my opinion, to impose a needlessly heavy burden upon the administration of rating.

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[13] [1932] 2 K.B. 362.

There is only one further point. In the course of their argument the appellants relied upon the decision of the Judicial Committee of the Privy Council in *Hoystead* v. *Commissioner of Taxation.*[14] They pointed out, as is quite true, that that was a case in which estoppel per rem judicatam was successfuly asserted against the taxing authority in respect of an assessment for the year 1920–21 because of a judgment on a case stated for the High Court in Australia relating to the assessment for the year 1918–19. The estoppel related to a question as to the nature of legal rights in property and the interpretation of the taxing statute with regard to them. But *Hoystead's* case [14] is useless to illuminate the only point which is now before this House, the effect on a succeeding valuation list of a decision given with regard to an earlier. At no stage of the proceedings, so far as appears, was the argument put forward on behalf of the commissioner of taxation that the assessment for 1920–21 was a new subject-matter in relation to the assessment for 1918–19: nor is the point noticed in the opinion of the Judicial Committee delivered by Lord Shaw. That opinion is devoted to considering with weight and learning, and ultimately to rejecting, the proposition advanced by Sir John Simon on behalf of the commissioner that there could be no estoppel because the legal point which had been the subject of the High Court's decision had been conceded by admission and did not therefore embody the court's own direct judgment. The case stands as an authoritative contribution to the rule that in matters of estoppel what might have been said may be as important as what was actually said, and that, as between the parties themselves, law may indeed be formed sub silentio. To apply the same conception to the elucidation of the law itself, and to suppose that decisions can be persuasive on propositions that were never considered, for good reasons or bad, would be an altogether unconvincing way of arriving at a judgment.

We do not know for what reason the point of "new subject-"matter" was not raised in *Hoystead's* case.[14] It is to be noted, however, that the decision that was set up as an estoppel was a decision of the highest legal tribunal in Australia, the High Court, arrived at by the full court upon a case stated for their opinion by a single judge of the High Court to whom there lay an appeal from the decision of the commissioner of taxation. Any objection, therefore, which was based on difference of subject-matter between the taxes for the respective years, would have to meet the puzzling question whether for the purposes of estoppel the jurisdiction of the High Court in adjudicating upon points of law arising in tax proceedings is not wider and more comprehensive than the jurisdiction of the original assessing tribunal. It is true that that aspect does not seem to have had any weight attached to it in the other decision of the Judicial Committee of the same year, the *Broken Hill* case.[15] But there the point did not call for, or receive, any full attention. I say nothing more about this. It is not the point before us and, if it ever arises, it will need separate consideration.

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[14] [1926] A.C. 155 (P.C.); 42 T.L.R. 207.

I would dismiss the appeal.

Lord Cohen. My Lords, I concur.

Lord Keith of Avonholm. My Lords, I do not repeat the facts of this case, which have already been fully set out by my noble and learned friend, Lord Radcliffe. The proposition submitted by Mr. Tolstoy for the appellants was that where a question has been decided by a court of competent jurisdiction in a lis inter partes, these parties are estopped from reopening the same question in a subsequent suit between themselves. This submission necessarily proceeded upon the assumption, which has not been challenged by the respondent, that the facts and circumstances relevant to the appellants' exemption from rating under section 1 of the Scientific Societies Act, 1943, remained unchanged from what they were when the local valuation court on October 24, 1951, decided that the appellants' hereditament was exempted from rating under the Act of 1843. Otherwise it would not be the same question that comes up for reconsideration.

The proposition advanced, which is impeccable in circumstances in which it is permitted to operate, is, in my opinion, inapplicable to the circumstances of this case. I find it difficult to equate the procedure followed out under the statute with a proper lis inter partes, though that, of itself, might not be conclusive. Nor do I find it easy to distinguish the functions

[15] [1926] A.C. 94.

performed by assessment committees before the coming into operation of the Act of 1948 from those now performed by a local valuation court, or to think, because the new body is differently constituted and called a court, that a greater importance and effect should be attached to its decisions. The introduction of a court into the proceedings instead of a committee played some importance, if I understood aright, in the submission for the appellants.

What we are faced with here is an administrative act of a public official, the valuation officer, against which the party affected has a right of appeal to the local valuation court, with further appeals to higher courts. The valuation officer has a public duty to perform by making periodically every five years a valuation list of all hereditaments, with certain exceptions, in his rating area. He must necessarily reconsider and revise the previous valuation list. He has no personal interest in any appeals taken against his valuations, and has a duty to hold the scales as fairly as he can among the ratepayers affected, the occupiers of the various hereditaments. The general body of ratepayers is constantly changing. With each quinquennium the revaluations will affect a new body of ratepayers. I doubt if the valuation officer owing such a duty to an ever-changing body of ratepayers can be regarded as always the same party in the sense in which that expression is used for the application of the rule of res judicata. What if the appellant society changes its habitat and moves into another rating area with a different valuation officer?

I emphasise these aspects of the functions of a valuation officer under the statute, for they lead to what I regard as the true answer to the submission for the appellants, which is that a public officer in the position of the respondent cannot be estopped from carrying out his duties under the statute. The case is, I think, a fortiori of the judgment of a Board of the Privy Council in *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*,[16] where it was held, in the circumstances of that case, that a public utility company could not be estopped from carrying out its duty under a statute. It has been said on other occasions that there is no estoppel against a statute. Lord Parker of Waddington applied this ratio in *Inland Revenue Commissioners* v. *Brooks*[17] with reference to an assessment to income tax which was claimed to

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[16] [1937] A.C. 610 (P.C.); 53 T.L.R. 391; [1937] 1 All E.R. 748.

[17] [1915] A.C. 478, 491–492 (H.L.); 31 T.L.R. 89.

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be final against the Commissioners for the Special Purposes of Income Tax in an assessment for super-tax. "I do not dispute," he said, "these general principles [of law governing estoppels], "but it seems to me that where there is a statutory provision "requiring an estimate to be made for a statutory purpose and "by a statutory authority, the principle of estoppel cannot be "invoked to render the provision nugatory in cases where such "principle might otherwise have applied."

If an entry in the valuation list has become final, that is a procedural matter and may be conclusive for the period for which the list endures. I say *may* be conclusive, for I observe that the Act (section 40) provides with reference to current valuation lists that a person aggrieved or a valuation officer may make a proposal for alteration of the list at any time. Whatever the effect of this may be I have reached the conclusion, for the reasons I have given, that when a new list is in preparation the valuation officer is not estopped by anything that he has done, or omitted to do, or by any decision given against him, in the past. He may, in my opinion, seek to rectify the result of mistakes in fact or errors of law. A previous judgment will have only the weight that falls to be attributed to it, according to the authority of the court that gave it, on the doctrine of stare decisis.

Much reliance was placed by counsel for the appellants on the judgment of the Privy Council in *Hoystead* v. *Commissioner of Taxation.*[18] That authority is not binding on this House, and the point was never taken in the case that a decision on liability to assessment to tax for one year is not conclusive of liability to assessment in a later year. The judgment would seem to conflict with what was said a month earlier in *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*[19] by a Board differently constituted, rejecting a plea of res judicata: "The "decision of the High Court," it was said, "related to a valuation and a liability to tax in a previous year, and no doubt as "regards that year the decision could not be disputed. The "present case relates to a new question—namely, the valuation "for a different year and the liability for that year. It is not "eadem quaestio, and therefore the principle of res judicata "cannot apply." In my opinion, that is the position here, and I do not find it necessary to examine *Hoystead's* case[20] further, beyond observing that some of the things that were said in that case are not, I think, entirely consistent with what was said in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[21] or with what I regard as essential to a successful plea of res judicata, a common medium concludendi in the two actions.

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[18] [1926] A.C. 155.

[19] [1926] A.C. 94, 100.

[20] [1926] A.C. 155.

It was suggested by appellants' counsel that the previous decision of the local valuation court was a judgment in rem fixing the status of the appellant society. But I cannot accept that the local valuation court has jurisdiction to pronounce judgments in rem. It is concerned with the entry of hereditaments in the valuation list, and under section 48 (4) "shall give such directions "with respect to the manner in which the hereditament in "question is to be treated in the valuation list as appear to them "to be necessary to give effect to the contention of the appellant "if and so far as that contention appears to the court to be well "founded." That is a general power with reference to the treatment of hereditaments in a particular valuation list and cannot, in my opinion, be taken to confer a power to make a declaration on the status of the occupier which would have all the binding effect of a judgment in rem. So to hold would indeed, I think, be against the provisions of the statute, if only because it would stultify the right given to a person aggrieved to make a proposal for alteration of the current list under section 40. The general considerations to which I have earlier referred are, in my opinion, equally strong reasons for rejecting this submission for the appellants. Reliance was placed on *Wakefield Corporation* v. *Cooke*.[22] The judgment there held to be a judgment in rem had reference to the status of a street as a public street. This was quite a different category of case decided under a statutory code which was held to give justices a power to determine once and for all the character of a street for the purposes of a local Act and cannot, in my opinion, be applied to the circumstances of this case.

Reference was made in the course of the argument to certain Scottish land valuation decisions thought to be unfavourable to the appellants' contentions. These may be put aside. At best they provide but illustrations of the practice in the matter of valuation under a co-ordinate jurisdiction which operates independently of and without appeal to the courts exercising civil jurisdiction in Scotland. The Lands Valuation Appeal Court in Scotland is, within limits, master of its own system of practice

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[21] [1939] A.C. 1, 41–42 (H.L.); 55 T.L.R. 260; [1938] 4 All E.R. 747.

[22] [1904] A.C. 31 (H.L.); 20 T.L.R. 115.

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and procedure, and a final court of law within its own sphere. The question, moreover, which arises on this appeal could not come before the Lands Valuation Appeal Court. It would be a question between the rating authority and the occupier which, in the event of dispute, would be matter of ordinary litigation in the civil courts. Such was the case in *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor*,[23] the speeches in which in this House, especially that of Lord Chelmsford, contain dicta on the rule of res judicata which are not helpful to the appellants. There were specialties, however, in that case which may make the dicta obiter, rather than the ratio of the decision. I do not, therefore, treat these observations as determinative of the point raised by this appeal. For the reasons, however, which I have already given, I think the appeal must fail.

LORD JENKINS. My Lords, I agree.

Appeal dismissed.

Solicitors: *Hillearys; Solicitor of Inland Revenue.*

F. C.

[23] L.R. 1 Sc. & Div. 17.

BEATRICE SUNEETHRA PERERA . . . APPELLANT;

AND

N. A. PERERA AND OTHERS . . . . RESPONDENTS.

J. C.*

1960

March 8.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law — Exceptio rei venditae et traditae — Execution— Seizure of property.

Ceylon—Execution—Doctrine of exceptio rei venditae et traditae—Principle of, and application—Civil Procedure Code (Legislative Enactments of Ceylon, 1938 *Rev., c.* 86), *s.* 238—*Construction.*

By section 238 of the Civil Procedure Code of Ceylon: " When " a seizure of immovable property is effected under a writ of execu- " tion . . . and notice of the seizure is registered . . . any sale . . . " made after the seizure and registration of the notice of seizure

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

"... is void as against a purchaser from the Fiscal selling under "the writ of execution and as against all persons deriving title "under or through the purchaser."

J., the appellant's husband, was in financial difficulties and his property was under seizure in several cases, in one of which judgment had been entered for Rs.1,000 on a promissory note. Pursuant to an agreement with his uncle to assist him to settle his debts and so prevent his property from being sold in execution, he sold the property, worth about Rs.30,000, to his uncle for Rs.16,000—the amount of his debts—subject to his right to repurchase it for the same amount within five years. The conveyance of April 17, 1950, stated that the property was free from any incumbrance. The purchase price of Rs.16,000 was paid to J.'s creditors. On the death of the uncle on August 28, 1950, the property passed to his daughter, the second respondent, and J. recognised her as the new owner.

Owing, apparently, to inadvertence, J. had omitted to include in the statement to his uncle of his debts the Rs.1,000 judgment on the promissory note, under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code had been served on him and registered. In pursuance of the seizure his property was put up for sale and purchased by one T. in February, 1951, for Rs.250. A few days after T. had obtained a Fiscal's transfer on the sale in execution he sold the property to the appellant for Rs.3,000. In July, 1951, the appellant, who was found to be a nominee of her husband J., instituted the present action against, inter alios, the second respondent, for a declaration of title to the property:—

Held, that although the title passed through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to the uncle's devisee, the second respondent, under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae.

In section 238 of the Civil Procedure Code the words "all "persons" did not include the judgment debtor; to hold otherwise and that J. was rendered immune by section 238 from the consequences of his own act, namely, the conveyance by him to his uncle, would be to permit gross injustice, because by so holding J., who had sold the property and had had the advantage of the consideration, would be entitled to evict his uncle (now the uncle's devisee, the second respondent).

Inasmuch, therefore, as section 238 did not render void as between themselves the deed of conveyance from J. to his uncle, there was no statutory provision which hindered the operation of the common law, and the title passed by operation of law automatically from the appellant as J.'s nominee to the second respondent under the doctrine of exceptio rei venditae et traditae at the moment that T. transferred the property to the appellant.

Anund Lall Doss v. *Jullodhur Shaw* (1872) 17 Suth. W.R. 313 and *Gunatilleke* v. *Fernando* (1921) 22 N.L.R. 385 considered.

Decree of the Supreme Court of Ceylon affirmed.

J. C.
1960

PERERA
v.
PERERA.

APPEAL (No. 24 of 1957) from two decrees of the Supreme Court of Ceylon (February 21, 1956).

The following facts are taken from the judgment of the Judicial Committee: This was an action for declaration of title brought in July, 1951, by the appellant in the District Court of Colombo in respect of certain property which had previously been sold by her husband, one Julius Perera, to one Lewis on deed D 9 of April 17, 1950. Lewis had died in August, 1950, leaving the property to his daughter, the second respondent, who was the second defendant in the action. Probate of Lewis's will was issued to the second defendant's husband, who was the first defendant and was the first respondent. The appellant also asked for an order of eviction. The third, fourth and fifth respondents were persons in occupation under the second respondent.

The district judge gave judgment for the appellant subject to the payment by her of a sum of Rs.12,304.79 as compensation to the respondent. That compensation was in respect of a similar sum belonging to Lewis which had been utilised to pay off a mortgage on the property.

The appellant and the second respondent both appealed to the Supreme Court. The former complained that the order for compensation was insupportable, and the latter contended that the appellant was not entitled to a declaration of title or to a writ of ejectment. The Court of Appeal (Gratiaen J., with whom Gunasekara J. agreed) held that the respondent was entitled to succeed, set aside the order of the district judge and dismissed the action.

The Supreme Court accepted the findings of fact of the district judge, and those that are relevant to a decision of this appeal can be shortly stated. The appellant (plaintiff) had been found to be a nominee of Julius, her husband. At the end of 1949 and in the beginning of 1950 Julius was in serious financial difficulties. His property was under seizure in several cases, one of which was D.C. Colombo 9041/S. In that case judgment had been entered for Rs.1,000 and interest payable on a promissory note. In April, 1950, Lewis, who was Julius's uncle, reluctantly agreed to assist Julius to settle his debts so as to prevent his property, worth about Rs.30,000, from being sold in execution. He received from Julius a document indicating that Rs.16,000 was required to meet his liabilities. An agreement was arrived at and was implemented on April 17, 1950, whereby Julius sold the property to Lewis for Rs. 16,000 subject to the vendor's right to repurchase it for the same amount within five years. The conveyance contained the following warranties and assurances: " And I the said " vendor for myself and my heirs, executors, administrators and " assigns do hereby covenant, promise and declare with and to " the said vendee, his heirs, executors, administrators and assigns " that the said premises hereby sold and conveyed are free from " any encumbrance whatsoever and that I have not at any time " heretofore made, done or committed or been party or privy to " any act, deed, matter or thing whatsoever whereby or by reason " whereof the said premises or any part thereof are, is, can, shall " or may be impeached or encumbered in title, charge, estate or " otherwise howsoever and that I and my aforewritten shall and " will at all times hereafter warrant and defend the same or any " part thereof unto him and his aforewritten against any person " or persons whomsoever and further also shall and will at all " times hereafter at the request of the said vendee or his afore" written do and execute or cause to be done and executed all " such further and other acts, deeds, matters, assurances and " things whatsoever for the further and more perfectly assuring " the said premises hereby sold and conveyed and every part " thereof, unto him or his aforewritten as by him or his afore" written may be reasonably required."

The Rs.16,000 was paid to the creditors whose names had been disclosed in the document handed by Julius to Lewis. At the same time Lewis was placed in possession of the property as owner and Julius acted as rent collector from his former tenants who attorned to Lewis. When Lewis died and the property passed to the second respondent the appellant and Julius acknowledged her as the new owner.

The material upon which the appellant's case was constructed arose from the following further facts. When Julius persuaded Lewis in April, 1950, to save the property from forced sales, he had (perhaps through inadvertence as stated by the Supreme Court) omitted to mention in the statement of his debts the debt payable under the decree in D.C. Colombo No. 9041/S (mentioned above) under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code had been served on him and registered. Lewis was unaware of the decree and of the seizure. It will be seen presently that the appellant (Julius's nominee) was claiming on a title derived through execution proceedings in case 9041/S against Julius. The registration of the seizure had been kept alive by the judgment-creditor's proctor, a Mr. Rasanathan. In pursuance of the seizure the property was put up for sale by the Fiscal and purchased in February, 1951, for Rs.250 by one Thiagarajah, who was Rasanathan's father-in-law. He had been held by the courts in Ceylon to have been Rasanathan's nominee. A few days after Thiagarajah had obtained a Fiscal's transfer on the sale in execution he sold it to the appellant for Rs.3,000. She then instituted this action. In effect Julius was trying to evict the devisee from Lewis to whom he had transferred the property and who had helped him out of his difficulties.

The district judge held that Thiagarajah was a nominee of Rasanathan, but found that it was " not possible to hold that " Thiagarajah was a nominee for Julius Perera." Chiefly for that reason he was unable to hold that the execution proceedings were a fraud contrived by Julius (as alleged by the respondent), and the Supreme Court found itself " unable to hold that the learned " judge was wrong in rejecting this argument (of fraud) on the " evidence before him." The district judge held that the transfer to Lewis was void under the provisions of section 238 of the Civil Procedure Code and that the appellant, though Julius's nominee, got good title from Thiagarajah and that she was entitled to succeed. The Supreme Court held that, although the title passed through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to Lewis's devisee under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae.

1960. Jan. 13. *Joseph Dean* for the appellant. The trial judge found as a fact that the Fiscal's sale was properly conducted in accordance with the Civil Procedure Code and was not procured by Julius in collusion with the purchaser Thiagarajah. These findings of fact were accepted by the Supreme Court. The sale took place on February 6, 1951, and the property had been under seizure since October 14, 1949, the seizure having been registered throughout the intervening period. In these circumstances the conveyance by Julius to Lewis dated April 17, 1950, was void as against Thiagarajah, who acquired a registered and indefeasible title to the property. The appellant as the purchaser from Thiagarajah stepped into his shoes and cannot be in any worse position so far as concerns the conveyance to Lewis, since by virtue of section 238 of the Civil Procedure Code that conveyance is absolutely void for all purposes against anybody who acquired title through the Fiscal. The only possible exception is fraud, and in this case there are concurrent findings that there was no fraud.

It is conceded that the Roman-Dutch law doctrine of exceptio rei venditae et traditae applies in Ceylon, but it has never apparently been applied in circumstances of this kind. It is submitted that the doctrine cannot prevail over the express provisions of section 238. As described in Voet, its scope is extremely wide: The Selective Voet, being the Commentary on the Pandects, Gane's Translation, (1956), Vol. 3, Title 3, p. 690. [Reference was made to *Anund Lall Doss* v. *Shaw*[1] and *Fernando* v. *Fernando*.[2]] Nevertheless the courts have construed the word "void" according to its ordinary meaning. Gratiaen J. said in the present case that as a result of the conveyance Lewis acquired a defeasible title. That cannot be right, since he could not have acquired any title whatever under a void disposition. The question here is whether Thiagarajah is prevented by the doctrine from passing on to the appellant his admittedly valid title. It is submitted that once a conveyance becomes void as a result of section 238 it cannot be revived or enforced in any way. The application of the doctrine in this case would result in its enforcement. [Reference was made to *Rajapakse* v. *Fernando*[3] and *Gunatilleke* v. *Fernando*.[4]]

All the authorities are concerned with sales without title, not with sales where the vendor has title but the sale is made void by statutory enactment, i.e., rendered a complete nullity. Since Lewis did not acquire even an equitable interest, there was nothing to which the exceptio rei venditae et traditae could be attached. Therefore it is not possible for the respondents by means either of the exceptio or of the covenants in the conveyance to defeat the appellant's title, which is valid on the face of it and was intended by the Code to be valid.

The respondents did not appear and were not represented.

March 8. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA. For reasons which follow their Lordships are of opinion that the decision of the Supreme Court must be upheld. In view of that opinion the correctness of the order for compensation does not arise for consideration. [His Lordship stated the facts as set out above and continued:] The only question which arises on this appeal is whether the Supreme Court was right in holding that, although the title passed

[1] (1872) 17 Suth.W.R. 313, 314.
[2] (1906) 9 N.L.R. 1.
[3] [1920] A.C. 892.
[4] (1921) 22 N.L.R. 385.

through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to Lewis's devisee under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae. It will be necessary to consider the doctrine itself and also whether sections 237 and 238 of the Ceylon Civil Procedure Code in any way hinder or modify the application of the doctrine.

Sections 237 and 238 are to the following effect: " 237.—(1) If " the property is immovable, the seizure shall be made by a " notice signed by the Fiscal prohibiting the judgment-debtor " from transferring or charging the property in any way, and all " persons from receiving the same from him by purchase, gift or " otherwise." The only other subsection of this section has no bearing on the questions arising in this case.

" 238. When a seizure of immovable property is effected under " a writ of execution and made known as provided by section " 237 and notice of the seizure is registered before the first day " of January, nineteen hundred and twenty-eight, in the book " formerly kept under section 237 or is registered on or after the " first day of January, nineteen hundred and twenty-eight, under " the Registration of Documents Ordinance, any sale, convey- " ance, mortgage, lease, or disposition of the property seized, " made after the seizure and registration of the notice of seizure " and while such registration remains in force is void as against " a purchaser from the Fiscal selling under the writ of execution " and as against all persons deriving title under or through the " purchaser."

It is argued for the appellant that as a purchaser from Thiagarajah she is a person " deriving title under or through the " purchaser " at the Fiscal's sale, and that consequently section 238 makes " void " as against her (and in effect against Julius, she being Julius's nominee), the conveyance by Julius to Lewis. Their Lordships do not agree.

As observed by the Supreme Court, the words " all persons " in section 238 are words of the " utmost generality " and " are " ex facie wide enough to include the judgment-debtor himself." But the section has been designed and enacted to protect persons against the acts of the judgment-debtor and not to protect or to benefit the judgment-debtor himself. The implication therefore arises that in this context " all persons " do not include the judgment-debtor. It is reasonable and just to hold that such an implication arises and the necessity for so holding is illustrated by the facts of this case. To hold that the judgment-debtor is rendered immune by section 238 from the consequences of his own act, namely, the conveyance by him to Lewis, would be to permit gross injustice because by so holding Julius, who had sold a property and had had the advantage of the consideration, would be enabled to evict his vendee (actually vendee's devisee). He would do so by taking advantage of a consequence of the non-disclosure by him to Lewis (whether deliberately or by inadvertence it matters not) of something he should have disclosed, namely, the decree and seizure in case 9041/S. If this disclosure had been made, Lewis would without doubt have paid off the judgment debt or made some other arrangement before accepting the conveyance from Julius.

Their Lordships observe that in the case of *Anund Lall Doss* v. *Shaw*[1] the Board, dealing with a section of the Indian Civil Procedure Code which declared "null and void" a private alienation after a seizure in execution proceedings had been effected, thought it could not be "null and void against all the world "including even the vendor." The language of the section was in many ways different from section 238 and the facts in the case were also different, but the view expressed supports the view taken by their Lordships.

If, as held by their Lordships, section 238 does not render void as between themselves the deed of conveyance from Julius to Lewis, there is no statutory provision which hinders the operation of the common law. Their Lordships are of opinion that the title passed by operation of law automatically from the appellant as Julius's nominee to the second respondent under the doctrine of the exceptio rei venditae et traditae at the moment that Thiagarajah transferred the property to the appellant. This doctrine and its development are discussed in a judgment of the Board delivered by Lord Phillimore in *Gunatilleke* v. *Fernando*.[2] Relying on the authority of Voet, Book 21, Title 3, he there set out in terms appropriate to that case the basic principle relevant to the present case thus[3]: "Under this exception the purchaser who "had got possession from a vendor, who at the time had no title, "could rely upon a title subsequently acquired by the vendor."

In the present case it might perhaps be suggested that it could not be said that Julius (at the time he executed the conveyance in favour of Lewis) had no title. It could be suggested that he had a title which he could not alienate. A reference to the authority relied on by Lord Phillimore shows that the exceptio is applicable to such a case. Voet, Book 21, Title 3, Section 1 (Gane's translation) is to the following effect: "When the right "of an alienator is confirmed the right also of him to whom, if "you have regard to the start of the matter, the alienation had "been wrongfully made, is confirmed at the first moment of "acquisition of ownership by the original vendor."

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[1] (1872) 17 Suth.W.R. 313.

[2] (1921) 22 N.L.R. 385.

[3] Ibid. 390.

Any "alienation wrongfully made" and not necessarily an alienation by a person without title is covered. Julius when he was under a prohibition against alienation made a wrongful alienation which was ineffective and the doctrine is applicable to his conveyance. It will also be seen that under the doctrine "at "the first moment of acquisition" of title by Julius (under the deed in favour of his nominee) that title passed to the second defendant as Lewis's successor.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal be dismissed. As the respondents have not appeared, there will be no order as to costs.

Solicitors: *T. L. Wilson & Co.*

C. C.

J. C.*
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March 21.

AUGUSTUS PATTERSON . . . . . . APPELLANT;

AND

PATRICK VINCENT JOSEPH SOLOMON . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad and Tobago—Legislative Council—Elected member—Contract with government for or on account of public service—Competence of elector to maintain proceedings for disqualification—Reference to Supreme Court by Legislative Council only — Appeal to Privy Council—Jurisdiction—Trinidad and Tobago (Constitution) Order in Council, 1950 *(as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council,* 1956), *ss.* 38 (3) (*e*), 40 (1).

Privy Council—Jurisdiction—Special jurisdiction of court below—Proceedings to disqualify elected member of Legislative Council—Trinidad and Tobago (Constitution) Order in Council, 1950 (*as amended*), *s.* 40 (1).

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* *Present*: VISCOUNT SIMONDS, LORD DENNING and LORD JENKINS.

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By section 40 of the Trinidad and Tobago (Constitution) Order in Council, 1950, as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956: "(1) All questions "which may arise as to the right of any person . . . (ii) to be or "remain an elected member of the Legislative Council, shall be "referred to the Supreme Court of the Colony . . ."

The appellant, a registered elector of Trinidad and Tobago, sought an injunction to restrain the respondent, who was an elected member of the Legislative Council of the colony, a member of the Executive Council and the Minister of Education and Culture, from claiming to be or in any way acting as the holder of those offices on the ground that his seat in the Legislative Council had become vacant under the provisions of section 38 (3) (*e*) of the Order in Council of 1950, as amended, by reason of his having become a party to a contract with the government of the colony for and on account of the public service:—

Held, (1) that section 40 of the Order in Council of 1950, as amended, contemplated a reference to the Supreme Court by the Legislative Council itself, and that the appellant could not competently maintain the proceedings in any form.

(2) That the appellant could not escape from the consequences of that decision by dropping his claim so far as it related to membership of the Legislative and Executive Councils and confining it to seeking to restrain the respondent from acting as Minister of Education and Culture. The respondent was, until the contrary was competently determined, a member of the Legislative and Executive Councils, and it was only if he ceased to be such a member that he could no longer hold the office of Minister to which he had been appointed. Unless and until the fact of disqualification had been established in the only manner permissible, it was not possible to argue its consequences.

(3) Further, even if upon a proper reference under section 40 of the Order in Council the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty in Council. Equally an appeal would not lie from a determination of that court upon the same subject-matter otherwise than upon such a reference.

The Order in Council created an entirely new jurisdiction in a particular court of the colony for the purpose of taking out of the Legislative Council, with its own consent, and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claimed to be members of the council, and the determination of that court was final and no appeal lay from it. The same principle also applied whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body.

Théberge v. *Laudry* (1876) 2 App.Cas. 102, *De Silva* (*G. E.*) v. *Attorney-General* (1949) 50 C.N.L.R. 481 and *Senanayake* v. *Navaratne* [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805, P.C. applied.

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APPEAL (No. 34 of 1958), by special leave, from a judgment of the Full Court of the Supreme Court of Trinidad and Tobago (November 13, 1957) dismissing an appeal from a judgment of the Supreme Court of Trinidad and Tobago (June 11, 1957) which had dismissed an application by the appellant for an injunction to restrain the respondent from claiming to be or in any way acting as a member of the Legislative and Executive Councils of the colony and as Minister of Education and Culture.

The following facts and the terms of the relevant Orders in Council are taken from the judgment of the Judicial Committee: This appeal arose out of proceedings instituted in the Supreme Court of Trinidad and Tobago by the appellant, a mattress maker and registered elector in that colony. On May 31, 1957, he was granted leave by the court to issue a notice of motion for an injunction restraining the respondent from claiming to be or in any way acting as (a) Minister of Education and Culture of the government of the colony, (b) a member of the Executive Council of the colony, and (c) a member of the Legislative Council of the colony. Notice was duly served on the respondent and supported by an affidavit of the appellant in which the grounds of the relief sought were stated. They were that the seat of the respondent in the Legislative Council of the colony had become vacant under the provisions of section 38 (3) (*e*) of the Trinidad and Tobago (Constitution) Order in Council, 1950, as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956, by reason of his having become a party to a contract with the government of the colony for or on account of the public service without first having disclosed to the legislature his intention of becoming a party to the said contract and without having first obtained from the legislature exemption from the consequences of becoming a party to such a contract. The details of the contract were then set out. It is not necessary to refer to them, for the merits of the case have not to be examined. [On December 19, 1956, soon after his appointment as Minister of Education and Culture, the respondent entered into a mortgage bill of sale with the Accountant General of the colony under which the Accountant General, acting for and on behalf of the government, lent him $3,500 (about £730) on the security of an Opel Kapitan motor-car. Repayment of the loan was to be by fixed instalments over four years.] In the courts of the colony and before the Board the issue turned on questions of jurisdiction and procedure. The remaining facts that need to be stated were that the respondent was duly returned as member of the Legislative Council of the colony for the constituency of Port of Spain South and took his seat on October 26, 1956, that on the same day he was elected to be a member of the Executive Council and was subsequently charged by the Governor with the administration of the Ministry of Education and Culture and assumed that office.

The relevant provisions of the operative Order in Council are stated in the terms of the Order in Council of 1950, as amended, where amended, by the Order in Council of 1956.

Section 4 provided that there should be an Executive Council for the colony which, subject to the provisions therein mentioned, should consist of the Governor as chairman, a Chief Minister, two ex officio members and seven elected members.

Sections 6, 7 and 8 provided for the election of the Chief Minister, for the ex officio members and for the election of the elected members, and section 9 for the tenure of office of members of the Executive Council. Section 10 provided that all questions which might arise as to the right of any person to be or remain a member of the Executive Council should be referred to the Governor and should be determined by the Governor acting in his discretion.

Section 20 provided that the Governor acting in his discretion might by his directions in writing declare which other departments, not including the subject of finance, might be assigned to members of the Executive Council other than ex officio members and on the advice of the Chief Minister charge any members of the Executive Council other than an ex officio member, subject as therein mentioned, with the administration of any other department or subject.

Section 29 provided that there should be a Legislative Council for the colony which should consist of 31 members, namely, two ex officio members, five nominated members and 24 elected members, with a proviso in regard to the Speaker of the Council.

Section 37 provided for disqualification for nomination or election of members. The grounds of such disqualification were numerous but need not be set out, for they were substantially repeated in section 38, which provided for the tenure of office of nominated or elected members of the Legislative Council, or, in other words, for disqualification after nomination or election.

Subsection (3) of section 38 was the immediately relevant provision. It provided that the seat of a nominated or elected member of the Council should become vacant upon a number of grounds which included (a) upon his death, or (b) if, in the case of a nominated member, he should be absent from the sittings of the Legislative Council as therein mentioned, or (c) if, being a nominated member, he was nominated as a candidate in any election of a member to the Legislative Council, or, being an elected member, was appointed as a nominated member, or (d) if he should cease to be a British subject or take such oath or do such act as therein mentioned, or (e) if he should become a party to any contract with the government of the colony for or on account of the public service, with a proviso for exemption by the Governor of any nominated member and by the Legislative Council of any elected member in the circumstances therein mentioned, or (f) if he should be adjudged or otherwise declared bankrupt under any law in force in any part of Her Majesty's dominions, or (g) if he should be sentenced by a court in any part of Her Majesty's dominions to death or imprisonment (by whatever name called) for a term exceeding 12 months, or upon divers other grounds which need not be enumerated.

Section 40—the most material clause—was as follows: "(1) "All questions which may arise as to the right of any person, "(i) not being an elected member of the Legislative Council to "be or remain a member of the Legislative Council as Speaker, "or (ii) to be or remain an elected member of the Legislative "Council, shall be referred to the Supreme Court of the Colony "in accordance with the provisions of any law in force in the "Colony. (2) All questions which may arise as to the right of "any other person to be or remain a member of the Legislative "Council shall be referred to the Governor and shall be deter-"mined by the Governor acting in his discretion."

Section 67 provided that: "(1) Any person who . . . (*b*) shall "sit or vote in the Legislative Council after his seat therein has "become vacant or he has become disqualified from sitting or "voting therein, knowing, or having reasonable grounds for know-"ing that . . . his seat has become vacant . . . shall be liable to a "penalty not exceeding 96 dollars for every day upon which he so "sits or votes," and (2) that "the said penalty shall be recover-"able by action in the Supreme Court of the Colony at the suit of "the Attorney-General."

Upon the motion coming before Watkin-Williams J. in the Supreme Court of the colony certain objections were taken in limine for the respondent. They were (1) that the procedure adopted by the appellant was not proper, in that he had applied for an injunction upon the footing that the procedure by way of quo warranto had been abolished in the colony, and (2) that the proceedings were not maintainable because (a) the offices held by the respondent were not subject to an order by way of injunction or quo warranto and (b) the appellant had not shown any sufficient interest entitling him to take proceedings. These objections were substantially overruled by the learned judge, who nevertheless refused the motion on the ground that the question of the right of the respondent to remain an elected member of the Legislative Council could only be entertained by the Supreme Court on a reference made to it by the Legislative Council itself and that the appellant was incompetent to bring proceedings against the respondent.

The appellant appealed to the Full Court of the Supreme Court. It is noteworthy, in view of the admission made by counsel upon appeal to Her Majesty in Council, that the same relief was sought as in the original motion. No distinction was made between the respondent's position as member of the Legislative Council, member of the Executive Council and Minister of Education and Culture.

The Full Court (Mathieu-Perez C.J., Camacho and Archer JJ.) dismissed the appeal in a judgment which the Board said was clear, cogent and exhaustive. The court found it necessary to deal only with the competence of the appellant to maintain the proceedings, and, affirming the learned judge, held that section 40 of the Order in Council contemplated a reference to the Supreme Court by the Legislative Council only, and that the appellant could not maintain the proceedings.

1960. Feb. 15, 16. *D. N. Pritt Q.C.* and *S. N. Bernstein* for the appellant.

Dingle Foot Q.C. (for the respondent) intimated that he would take the point that the Board had no jurisdiction to decide the question whether the respondent was entitled to remain a member of the Legislative Council.

Pritt Q.C. On this appeal it is only sought to maintain that the respondent was not entitled to retain his office of Minister. There are two propositions: (1) In Trinidad when a person purports to hold the position of Minister, and if events occur which cause him to be disqualified and cease to be a Minister, Her Majesty's courts may test that not exactly by quo warranto, but by quo warranto's statutory heir, an application for an injunction. (2) When the court does so test this particular issue it will come to the conclusion that the respondent cannot be a Minister unless he is a member of the Executive Council, and that he cannot be a member of the Executive Council unless he is a member of the

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Legislative Council; and that he ceases to be a member of the Legislative Council if he enters into a contract with the government for or on account of the public service.

The procedure for testing points of the above nature is in Trinidad the same as it is in England. That is, any such question which previously to 1939 could be tested by an application for quo warranto can now be tested by an application for an injunction: see Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 9. An instance of the old quo warranto jurisdiction is best found in *Darley* v. *The Queen*[1]; see also *Rex* v. *Speyer*; *Rex* v. *Cassel*.[2] Whatever might be the position in relation to the respondent's membership of the Legislative Council, his office as Minister was and is clearly within the ruling in *Darley* v. *The Queen*,[3] and the office of Minister can be challenged by proceedings in the nature of quo warranto. The holding of the Ministry is plainly an office: see section 1 of the Order in Council, which says in effect that it is an office; it is an office created by the Crown and without the help of Parliament and is a public and substantive office.

The trial judge said in his judgment: "I have come to the "conclusion that the provisions in the Trinidad and Tobago (Con-"stitution) Order in Council . . . must be regarded as complete "and exclusive and that this matter cannot be brought before "the court by way of the procedure which the applicant has "adopted. It is a procedure which is not applicable in England "to Members of Parliament and likewise it is not applicable here "in this Colony to members of the Legislative Council." The position of a Minister, however, is very different from that of a Member of Parliament. The respondent having become a party to a contract in terms of the provisions of section 38 (3) (*e*) of the Order in Council, his seat in the Legislative Council had become vacant and he was therefore no longer a Minister.

Election petitions have nothing to do with this case at any stage. Nobody has challenged the validity of the respondent's election. Therefore he was a validly elected member when the appellant discovered what had been done. It is quite clear that the appellant, having a sufficient interest, had a right to say to the respondent, "You acted as a Minister, you had no right to "be a Minister because you are not validly a member of the

[1] (1845) 12 Cl. & F. 520, 536, 539, 544.

[2] [1916] 1 K.B. 595, 611; 32 T.L.R. 211.

[3] 12 Cl. & F. 520.

"Executive Council, and you ceased to be so because you ceased "to be a member of the Legislative Council when you entered "into this contract."

S. N. Bernstein following. The argument for the appellant is not in any way affected by the provisions of section 40 of the Order in Council, which do not necessarily involve the determination of any question under section 38 (3). The respondent having been disqualified (the allegations in regard thereto made by the appellant have not been challenged by the respondent) there is nothing in any of the provisions of the Order in Council depriving the appellant of his ordinary right to bring these proceedings.

Dingle Foot Q.C. and *Ralph Millner* for the respondent. With regard to the genesis of the words of the Order in Council of 1956, similar words are to be found in the Malta Constitution Letters Patent of 1921 and were considered in *Strickland* v. *Grima*.[4]

Mr. Pritt said that he was only attacking the right of the respondent to be a Minister. That is not the way in which the matter was put in the courts below, when an injunction was sought to restrain the respondent from acting either as a Minister or as a member of either the Executive Council or the Legislative Council. The whole basis of the argument was that he could not be a Minister because he was not entitled to be a member of the Executive Council, and that he could not be such a member because he was not entitled to be a member of the Legislative Council—it was not sought here to impugn his appointment as a Minister in any other way.

It is not open to any court of law to say that the respondent had no right to be a member of the Executive Council—that is a matter which, under section 10 of the Order in Council, is reserved for the sole decision of the Governor. The argument for the appellant must necessarily fall to the ground unless he can successfully impugn the right of the respondent to remain a member of the Legislative Council. That raises a question of the jurisdiction of this Board. There has been a series of decisions in which the Board has held that where an election court has decided on a disputed election no appeal will lie to the Board from its determination. It is submitted that the question whether someone is entitled to remain a member of the Legislative Council falls into precisely the same category. Here one is dealing with a special procedure whereby the Supreme Court is entrusted with functions which in earlier days would have been discharged by the legislature itself.

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[4] [1930] A.C. 285.

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The right of an elected member of a legislative assembly to be or remain a member can be determined in one of two ways: (1) either by the legislature itself, or (2) by reference to a court to which this jurisdiction has been especially assigned or delegated. There have been two occasions when questions have arisen as to whether a member was disqualified from remaining a member of the House of Commons: *In re Samuel* [5]; *In re Macmanaway and In re The House of Commons (Clergy Disqualification) Act, 1801.*[6] In those two cases the House of Commons referred a case to this Board, but retained in its own hands the ultimate action. Until 1868 all questions on whether a member was or remained a member were decided by the House of Commons itself—either by the whole House or a Committee of the House. [Reference was made to Anson's Law of the Constitution, vol. 1, p. 178.]

All questions under section 40 of the Order in Council as to the right of any person who was not an elected member to be or remain a member of the Legislative Council were to be referred to the Governor, but elected members were in a different category and under section 40 (1) (ii) the reference has to be to the Supreme Court; in neither case is it contemplated that there should be anything in the form of normal litigation.

As regards jurisdiction, this Board has no jurisdiction to decide the question whether the respondent was entitled to remain a member of the Legislative Council. That is a matter which can only be determined by the assembly itself or, where statutory provision has been made, by the court to which the matter is to be referred: *Théberge* v. *Laudry* [7]; *Strickland* v. *Grima* [8]; *De Silva* v. *Attorney-General* [9]; *Senanayake* v. *Navaratne.*[10] In the present case the same considerations apply; it will be necessary to adjudicate upon the status of a member; it is a matter for the legislature itself except in so far as they have delegated to an election court; and where they have done so, the judges of that court step into the shoes of the legislature, and this Board has held that in such cases it never was the intention to create a right of appeal. This appeal cannot be allowed unless the Board does what it has never yet done—adjudicates on whether the respondent was a member. Where there is a form of words which has been the subject of judicial interpretation, and those words are repeated in some later instrument, it must be assumed that the legislature intended the same result: *Cooray* v. *The Queen.*[11] If this jurisdiction point is right, then, of course, nothing further arises.

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[5] [1913] A.C. 514; 29 T.L.R. 429.

[6] [1951] A.C. 161; 66 T.L.R. (Pt. 2) 808.

[7] (1876) 2 App.Cas. 102.

[8] [1930] A.C. 285.

[9] (1949) 50 C.N.L.R. 481.

[10] [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805.

Assuming against the respondent that it was proper to institute proceedings by way of an application for quo warranto, even so, the same considerations would apply as were set out in *Théberge's* case [12] and have since been affirmed by the Board three times. The courts below were right, however, and all that was intended here was to create a special procedure and there must be a reference by the legislature itself.

Pritt Q.C. in reply. If accepted, the main argument for the appellant makes the question of what exactly is the power which the Legislative Council and the Supreme Court have under section 40 of very little importance or interest. What has been submitted does not raise a question under section 40 even indirectly; it is sought to challenge the respondent's right to remain a Minister because there is no doubt at all under section 38 that he has ceased to be a Minister. The submission for the respondent that this Board has no jurisdiction to hear this appeal because it falls into the same field as election petitions is based on a complete misunderstanding of the position. [Reference was made to the cases of *Théberge*,[12] *Strickland*,[13] *De Silva* [14] and *Senanayake*.[15]]

March 21. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts and the terms of the Orders in Council set out above, and continued: It would appear to their Lordships that the words " to be " in section 40 refer to the initial nomination or election which is dealt with by section 37, and the word " remain " to the grounds of subsequent disqualification dealt with by section 38. They further note that the Order in Council of 1950 provided that all questions as to the right of any person to be or remain an elected member of the Council should be referred to *and determined by* the Supreme Court of the colony in accordance with the provisions of any laws in force in the colony, whereas in the amending Order of 1956 the italicised words have dropped out. The explanation of this is not obvious: it is possible that it was intended to emphasise that the function of the Supreme Court is advisory rather than determinative, whereas the questions which are referred to the Governor are still to be determined by him.

[11] [1953] A.C. 407; [1953] 2 W.L.R. 965.

[12] 2 App.Cas. 102.

[13] [1930] A.C. 285.

[14] 50 C.N.L.R. 481.

[15] [1954] A.C. 640.

Upon appeal to Her Majesty in Council the appellant abandoned his claim to relief so far as it related to the respondent's membership of the Legislative and Executive Councils, maintaining it only in relation to his office of Minister. It is that issue which their Lordships are invited by the appellant to determine.

At once, upon the opening of the appeal, counsel for the respondent took the objection that no appeal lay to Her Majesty in Council from the decision of the Supreme Court of the colony in a matter affecting membership of the Legislative Council and consequently affecting also membership of the Executive Council and the office of Minister. It was open to him to do so notwithstanding that special leave to appeal had been granted.

This objection can conveniently be examined upon the footing that the appellant's claim had been maintained in its entirety. Upon this footing it appears to their Lordships that it must be sustained. Adapting the words of Lord Cairns L.C. in *Théberge* v. *Laudry*,[1] they are of opinion that, upon a fair construction of the Order in Council, it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court of the colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the Council itself of determining the status of those who claim to be members of the Council. If so, it follows that the determination of that court is final and that from it no appeal lies. Nor does this rest on the validity of the assumption that apart from section 40 of the Order in Council the question could be determined by the Council itself. In *De Silva* v. *Attorney-General*[2] it was made clear that the same principle applies whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body. As was said in that case[3] the dispute is one which "concerns the "rights and privileges of a legislative assembly, and, whether "that assembly assumes to decide such a dispute or it is sub-"mitted to the determination of a tribunal established for that "purpose, the subject-matter is such that the determination must "be final, demanding immediate action by the proper executive "authority and admitting no appeal to His Majesty in Council." It is therefore unnecessary to consider whether, apart from the Order in Council, the Legislative Council could itself have determined such a dispute. It is sufficient that the dispute is of such a character that the decision of the court to which it is referred must be final. To this effect also is the decision of this Board in *Senanayake* v. *Navaratne*.[4]

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[1] (1876) 2 App.Cas. 102, 106.

[2] (1949) 50 C.N.L.R. 481.

[3] Ibid. 483.

If, as their Lordships hold, an appeal would not lie from a determination of the Supreme Court upon a reference under section 40 of the Order in Council, equally it cannot lie from a determination of that court upon the same subject-matter otherwise than upon such a reference. Their Lordships do not entertain any doubt upon the correctness of the decision of the Supreme Court that the appellant could not competently maintain the proceedings in any form. They only add that, if he could, no appeal would lie. They find it unnecessary to add any observations upon the somewhat cryptic words in section 40 of the Order, "in accordance with the provisions of any law in force in the "Colony." They cannot afford any assistance to the appellant.

But, as has already been said, counsel for the appellant, faced by a difficulty which he might well regard as insuperable, abandoned his claim for relief in regard to the respondent's membership of the Legislative and Executive Councils. But, while thus admitting that so far as these proceedings were concerned he could not claim that the respondent had ceased to be such a member, he nevertheless insisted that he was entitled to an injunction restraining him from acting as Minister of Education and Culture. This claim is clearly not tenable. The respondent is, until the contrary is competently determined, a member of the Legislative Council. He is, until the Governor otherwise determines under section 10 of the Order in Council, a member also of the Executive Council. It is only if he "ceases to be" such a member that he can no longer hold the office of Minister to which he has been appointed. The appellant cannot, by omitting a necessary link in the chain of his argument and assuming that to be proved which he cannot even try to prove, arrive at the conclusion at which he aims. But that is what he invited their Lordships to do. The disqualifying event, he urged, was an event susceptible of proof like any other event and, being proved, led automatically to disqualification, and disqualification led in its turn to incompetence to hold office. And (so their Lordships understood the argument to proceed), so long as the object of the proceedings was not disqualification but its sequel, section 40 had no application. The argument was enforced by illustrations from other proceedings in which it might be necessary to prove that a particular person was or was not at a given time a member of the Legislative Council, e.g., in order that he might qualify as a beneficiary under a will or settlement. Their Lordships cannot accept this argument. Whether the purpose of the proceedings is directly to challenge the right of a person to be a member of the Legislative Council or to challenge his right only for some ulterior purpose, he is confronted by section 40 and, if there is in fact a question to be determined, he is arrested in his argument until the Supreme Court upon a proper reference has determined it, or, perhaps it should be better said, has advised upon it. No doubt in most cases, as, for example, if the event disqualifying the person concerned is his death, such a reference would be regarded as unnecessary, and in other cases it could be merely formal. But where, as here, the proceedings are controversial, there is no escape from the explicit terms of section 40. Unless and until the fact of disqualification has been established in the only manner permissible, it is not possible to argue its consequences.

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[4] [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805, P.C.

Their Lordships therefore reach these conclusions: (1) that the Supreme Court was right in deciding that the appellant could not maintain his action in the form in which it was presented to it, (2) that he cannot escape from the consequences of that decision by dropping his claim so far as it relates to membership of the Legislative and Executive Councils, and (3) that, if upon a proper reference the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty in Council. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

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HUSSENABAI HASSANALLY AND ANOTHER . APPELLANTS;

AND

MOHAMED MUHEETH MOHAMED CASSIM AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Restitution—Unjust enrichment—Roman-Dutch law—Bona fide occupier of land—Assumed lawful possession—Right against true owner to compensation for improvements—Equitable principles applicable.

Roman-Dutch Law—Fideicommissum—Land—Bona fide occupier—Partition—Right of occupier to compensation.

The second respondent, who upon the death of her mother became entitled to a half share in certain property subject to a fideicommissum, purported in 1945 to grant to a lessee—on whose death the appellants as executors of his estate were substituted as defendants—a lease of the whole of the property for a term of 30 years, the deed providing that the lessee was to erect on the land certain buildings, the use of which he was to enjoy during the term of the lease and which, at the end thereof, he was to deliver up to the lessor free of any payment. The lessee constructed the stipulated buildings. Thereafter, in 1953, an action was begun under the Partition Act, 1951, of Ceylon by one of the four children of the second respondent's sister (she having died in 1938) who were each entitled to a one-eighth share of the property subject to the fideicommissum, claiming a declaration of title to the property and a sale under the Act. The trial judge held that the second respondent had held herself out as the sole owner of the land, and that the lessee had constructed the buildings in the bona fide belief that she was in fact the sole owner. The appellants claimed that in the event of a sale of the property being ordered in terms of the Partition Act—which had the effect of extinguishing the leasehold rights—they should be paid out of the proceeds of sale a sum as compensation for the buildings erected and other improvements effected by the lessee. A decree for sale having been made:—

Held, that the appellants were entitled to the compensation claimed, and that the final adjustment of their rights should be made in the partition suit to which they were proper and necessary parties.

No distinction was to be drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession; on the contrary, the right of the improver to compensation rested on the broad principle that the true owner was not entitled to take advantage, without making compensation, of the improvements effected by one who made them in good faith believing himself entitled to enjoy them whether for a term or in perpetuity.

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

Bellingham v. *Bloommetje*, 1874 Buch. 36; *Rubin* v. *Botha*, 1911 A.D. 568 (South Africa); and *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*, 1915 A.D. 636 (South Africa) applied.

Parkin v. *Lippert* (1895) 12 S.C. 179 (Cape of Good Hope) considered.

Soysa v. *Mohideen* (1914) 17 N.L.R. 279 overruled; in that case the claim, like that in the present case, was not made qua lessee, but in respect of the bona fide occupation of land under a lease which had been repudiated—the claim was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. "It "would be difficult to imagine a clearer violation of the moral "principle upon which the rule against unjust enrichment rests, "than that an owner, who has, for whatever reason, prematurely "brought a lease to an end, should at once deny to the lessee the "rights which the lease or the common law gives him as lessee and, "because he was a lessee, deny also his claim to compensation for "improvements."

Hevawitarane v. *Dangan Rubber Co. Ltd.* (1913) 17 N.L.R. 49; *Government Agent, Central Province* v. *Letchiman Chetty* (1922) 24 N.L.R. 36; *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.* (1923) 25 N.L.R. 267; and *Jasohamy* v. *Podihamy* (1943) 44 N.L.R. 385 considered.

Judgment of the Supreme Court of Ceylon (1957) 59 N.L.R. 160 reversed.

APPEAL (No. 3 of 1959) from a judgment and decree of the Supreme Court of the Island of Ceylon (September 5, 1957) reversing a judgment and decree of the District Court of Colombo (May 20, 1955) in a partition action instituted by the plaintiff-respondent, M. M. M. Cassim, under the provisions of the Partition Act, No. 16 of 1951, for a declaration of title to a property in New Moor Street, Colombo, and for the sale of the property under the Act.

The following facts are taken from the judgment of the Judicial Committee: The appellants were the executors and trustees of the estate of one Akbarally Abdulhussan Davoodbhoy, who was originally the fifth defendant in the action out of which this appeal arose. Upon his death they were substituted for him as defendants. He will for convenience sometimes be referred to as the fifth defendant.

The action was concerned with certain land situated in New Moor Street, Colombo, which at the date of her death was held by one Rahumath Umma subject to a fideicommissum created in 1871 in favour of her descendants. She died in 1921 leaving as her heirs two daughters, Umma Shiffa and the second respondent Zaneera Umma, each of whom became entitled to a half share of the property subject to the fideicommissum. Umma Shiffa died in March, 1938, leaving as heirs her four children, the youngest of whom, Mohamed Cassim, became the plaintiff in the action and was a respondent to this appeal, and the others were defendants in the action and were also respondents to this appeal. The position then was that the second respondent was entitled to 4/8th shares of the property and the other four respondents who have been mentioned to 1/8th share each, all such shares being subject to the fideicommissum. For this reason there were added as defendants certain children of one of the children of Umma Shiffa who were also respondents to this appeal. It was in these circumstances that the plaintiff (the first respondent) brought his action under the provisions of the Partition Act, No. 16 of 1951, claiming a declaration of title to the property and a sale under the Act. But, for the reason which will now be stated, he made defendants not only the persons who were interested with him under the fideicommissum, but also the fifth defendant whose interest arose in a different way. It was not disputed that the latter's interest was such that he was a proper and necessary party to the suit.

On December 11, 1945, the respondent Zaneera Umma, who was entitled to 4/8th shares of the property, by a deed of that date granted to the fifth defendant in consideration of the sum of Rs.2,700 and of the covenants and conditions therein contained a lease of the property for 30 years from January 1, 1945, at the yearly rent of Rs.180 for the first 15 years and thereafter at the yearly rent of Rs.240. The deed contained a covenant by the lessee that he would " within a reasonable time lay out and " expend at his own expense in erecting and completing fit for " habitation with proper materials of all sorts upon the said " ground dwelling houses, tenements, shops, boutiques or " factories " as therein provided. It was further provided that the lessee, having completed the erection of the buildings as therein mentioned, should continue to exercise, use and enjoy the rights, benefits, interest and income of the premises and the buildings erected thereon during the pendency of the term of 30 years demised by the lease and, further, that the lessee should keep the said buildings in proper order and condition and at the end of the term deliver up the whole of the premises to the lessor free of payment of any kind whatever.

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The fifth defendant as lessee entered upon the demised land and duly constructed upon it the buildings for which the lease stipulated. The District Judge held that Zaneera Umma held herself out as the sole owner of the land and that the fifth defendant constructed the buildings in the bona fide belief that she was in fact the sole owner. He further held that the plaintiff in the action and the other heirs of Umma Shiffa made no protest but stood by and acquiesced in the improvement of the land by the fifth defendant. The Supreme Court did not concur in this last finding, but that was not material in the present appeal.

In these circumstances the fifth defendant by his amended statement of claim in the action (inter alia) claimed that in the event of a sale of the property being ordered in terms of the Partition Act the sum of Rs.35,000 as compensation for the buildings erected and other improvements effected by him should be paid to him out of the proceeds of sale.

The District Judge in the first place directed that the property should be sold subject to the right of the sixth and seventh defendants (the present appellants), who had by then been substituted for the fifth defendant, to remain in possession of a half share of the premises and the entirety of the buildings thereon for the full term of 30 years demised by the lease. This part of the order was not supported by the appellants and need not further be considered. The judge, however, further held that in the event of his order not being upheld the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the fifth defendant. He fixed the quantum of compensation at Rs.25,125.45 and this figure was not in dispute. It was this part of the decision which was rejected by the Supreme Court (H. N. G. Fernando J. and T. S. Fernando J.) on appeal and which the appellants now sought to maintain.

1960. Jan. 14, 18. *E. F. N. Gratiaen Q.C.* (Ceylon) and *Walter Jayawardene* for the appellants. *Soysa* v. *Mohideen*,[1] on which the Supreme Court relied, held that a person who had improved property believing himself to be a lessee was not entitled to compensation. It is submitted that in Roman-Dutch law a lessee's right to compensation was, in the absence of agreement, limited because of the operation of the Placaat of 1656 and not because he did not have "possessio civilis" in the strict sense. The "lessee" in *Soysa* v. *Mohideen*,[1] like the fifth defendant in the present case, was a "frustrated" lessee, and his right to compensation fell to be considered not on the footing that he was a true lessee, but on the footing that he was a bona fide occupier holding for his own benefit. It is submitted that a bona fide occupier holding for a considerable period of time for his own benefit is entitled to compensation for improvements from the owner. The Roman-Dutch law makes no distinction between a bona fide possessor in the strict sense, that is to say, a person possessing in the belief that he was the owner, and a bona fide occupier. Not to concede the right to a bona fide occupier would necessarily involve a violation of the principle of unjust enrichment which in the Roman-Dutch law is fundamental. This principle is regarded as so important that, in spite of the principle that a man should not derive any benefit from his own wrong, some writers have conceded the right to compensation for improvements even to a mala fide possessor.

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[1] (1914) 17 N.L.R. 279.

There were four notable decisions of the South African courts decided prior to *Soysa* v. *Mohideen* [1] which were not brought to the attention of the Supreme Court in that case. The effect of those cases has been summarised by Lee and Honoré in The South African Law of Obligations, (1950), p. 189, para. 713, and by Wille in Principles of South African Law, 4th ed. (1956), pp. 473, 479. Of those four South African cases *Bellingham* v. *Bloommetje* [2] is exactly in point. In the other three cases also (*Parkin* v. *Lippert*,[3] *Rubin* v. *Botha* [4] and *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*[5]) the principle that a bona fide occupier is entitled to compensation for improvements was applied. The decision of the Supreme Court in *Hevawitarane* v. *Dangan Rubber Co. Ltd.*,[6] which had been decided earlier, was not referred to in *Soysa* v. *Mohideen.*[7]

The decision of the Supreme Court is contrary to the principle of unjust enrichment and also to the views of Voet, Grotius and Groenewegen: see Gane's translation of Voet, vol. 6, p. 236; Grotius' Jurisprudence of Holland, Book 2, Chap. 10, sec. 8; Groenewegen, Book 2, Tit. 1, sec. 30. Since the decision in *Soysa's* case [7] the Supreme Court has in two decisions (*Government Agent, Central Province* v. *Letchiman Chetty* [8] and *Jasohamy* v. *Podihamy* [9]) conceded the right to compensation to persons who did not have "possessio civilis" in the strict sense. It is submitted that the time has come for an authoritative ruling on whether possessio civilis in the strict sense is necessary to constitute bona fide possession or, in any event, to entitle a bona fide improver holding for himself to compensation for improvements.

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[1] 17 N.L.R. 279.

[2] 1874 Buch. 36.

[3] (1895) 12 S.C. 179, 188 (Cape of Good Hope).

[4] 1911 A.D. 568, 575 (South Africa).

[5] 1915 A.D. 636, 653 (South Africa).

[6] (1913) 17 N.L.R. 49.

[7] 17 N.L.R. 279.

[8] (1922) 24 N.L.R. 36.

[9] (1943) 44 N.L.R. 385.

The alternative submission, if the Board thinks that *Soysa's* case [10] should not be interfered with, is that in the scheme of the Partition Act it is clear that the improvements have to be valued separately, and that in the case of an order for sale the court had to make a decision as to how apportionment of the purchase price should be made, and who should ultimately receive out of the purchase price the value of the improvements. The submission is that here it should ultimately come to the appellants. There are two stages; as between the first defendant, the purported lessor, and the other group of holders, the value of the improvements should be allocated to the first defendant, who had improved the premises through her lessee: see *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.*[11] and *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.*[12] The second stage is that once it comes to the first defendant it necessarily would be a violation of the rule against unjust enrichment that she should retain the compensation. In the present case as between the first defendant and the co-heirs there is no controversy whatsoever if one accepts the position that a man can improve through his lessee, because the first defendant, the lessor, was both a co-owner and a fiduciary at the time the improvements were effected, and both co-owners and fiduciaries in partition cases have been expressly said to be entitled to compensation. So the first defendant should get it as against the co-owners. The lessor who improves through his lessee is deemed to be the improver himself: *Appuhamy's* case.[13] The first defendant here would be entitled as against the co-heirs to the entirety of the compensation for improvements, first, because she is an improving co-owner (*Fernando* v. *Rodrigo* [14]), and, secondly, because she is an improving fiduciary (*Dassanayake* v. *Tillekeratne* [15]; *Mudaliyar Wijetunga* v. *Duwalage Rossie*.[16] All these artificial refinements would not be necessary, however, if the correct rule of Roman-Dutch law were applied to the main issue.

The respondents did not appear and were not represented.

[10] 17 N.L.R. 279.
[11] (1923) 25 N.L.R. 267, 271.
[12] (1923) 23 N.L.R. 129.
[13] 25 N.L.R. 267.
[14] (1919) 21 N.L.R. 415.
[15] (1917) 20 N.L.R. 89, 92.
[16] (1946) 47 N.L.R. 361, 372.

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March 7. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. This appeal from a judgment of the Supreme Court of the Island of Ceylon raises a question of considerable importance. It has involved an examination of a body of case law in which their Lordships have had the advantage of the assistance of learned counsel for the appellants, who, appearing without an opponent, has impartially directed attention to all material authority. The facts, which are not in dispute, can be shortly stated. [His Lordship stated the facts set out above and continued:] The Supreme Court, in deciding that the respondents are entitled to enjoy the fruits of the fifth defendant's labour and expense without paying any compensation therefor, were largely influenced by a decision of the Supreme Court in *Soysa* v. *Mohideen.*[1] But before examining this case their Lordships think it right to refer to certain authorities which, had they there been referred to, might well have led to a different conclusion. Their immediate purpose in doing so is to show that hitherto no distinction had been drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession, but that, on the contrary, the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity.

Reference may first be made to textbooks of high authority. In Wille's Principles of South African Law, 4th ed., at p. 479, it is said: "A very common application of the doctrine of unjust "enrichment occurs in cases where improvements or additions "to landed property have been made, without the express or "implied consent of the owner of the property, by a person in "possession of the property. A person who expends money or "labour in improving property with the intention of doing so for "his own benefit, whereas in fact he had no right or title to "the property, in consequence of which the improvements are "acquired by the owner of the property by virtue of accession, "is entitled to claim from the latter the amount by which the "property has been enhanced in value.

"Improvements of this nature are effected, as a rule, to "the land of one person by a bona fide possessor of the land,

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[1] (1914) 17 N.L.R. 279.

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" such as a fiduciary, or by a person who believes that he is a " fideicommissary. A bona fide occupier of land, such as a " person occupying land under the mistaken belief that he has " a lease of the property, has the same right to compensation " as a bona fide possessor."

Earlier editions of this work had substantially the same statement.

In The South African Law of Obligations by Lee and Honoré (1950), paragraph 713, at p. 189, runs as follows: " Preservation " and improvement of property. A person who preserves the " property of another from loss, deterioration or destruction, or " who, acting on his own behalf, improves the property of " another, in the belief that it is or will be his own (or, in some " cases, that it belongs to a third person) may claim compensation " from the owner for necessary and useful expenses thereby " incurred, not exceeding the value of the benefit accruing to the " owner." For this proposition numerous cases were cited, to some of which their Lordships will now refer. Before doing so they observe that in the present case the often troublesome questions whether the improver has acted bona fide or mala fide and whether he is entitled to remain in occupation of the land until compensation has been paid do not arise. The bona fides of the fifth defendant is admitted and the appellants do not in a partition action claim to remain in possession.

In 1874 *Bellingham* v. *Bloommetje*[2] was decided by de Villiers C.J. in the Supreme Court of the Cape of Good Hope. It must be examined at length because it goes to the root of the matter, and it has not been fully appreciated in the Supreme Court of Ceylon. The headnote so far as material is as follows: " Where a " person has bona fide built upon land not his own, he is entitled " to compensation for useful expenses incurred by him to the " extent to which the value of the land has been enhanced by the " building." The defendant acting in good faith and the belief that he had a lease of certain land, which in fact did not form part of land leased to him, built on it a house and a dam. The true owners sought to evict him. It was held that he was entitled to compensation for the amount by which the value of the land was enhanced by the house and dam. The Chief Justice says[3]: " I " am of opinion that the appellant had not sufficient reasons to " believe he was building on another man's ground, but that he

[2] 1874 Buch. 36.

[3] Ibid. 38.

"was the bona fide occupier of the land. . . . All the Roman-"Dutch authorities are agreed that, where a bona fide occupier "has built upon land belonging to another he is entitled to com-"pensation for the useful expenses incurred by him, that is to "say, for the expenses to the extent to which the value of the "land has been enhanced by the building." For this proposition the learned judge cites a wealth of authority, including Voet and Grotius, and then goes on to discuss the rights of a mala fide possessor, which are not now relevant. But the salient fact is that in this case the improver, who was held to be entitled to compensation, thought that he was, but in fact was not, the lessee of the land which he had improved. It was because he bona fide thought that he was entitled to occupy the land and in that belief improved it, that his claim to compensation arose. Nothing turned on the fact that he was truly the lessee of the adjoining land or that his bona fide mistake was about the boundaries of the land demised. He was a bona fide occupier.

In *Parkin* v. *Lippert*[4] the facts were somewhat complicated, but the case illustrates the importance of bearing in mind the distinction between improvements effected by a lessee whose lease endures for the stipulated term, and those effected by a lessee whose term is prematurely determined by operation of law. The material part of the headnote is as follows: "Where a lessor "takes advantage of the law which puts premature end to a lease "upon the insolvency of the lessee, he is liable, in the absence "of any stipulation to the contrary, to the trustee of the lessee's "estate for the value of improvements made by such lessee in "contemplation of the lease being allowed to run its full term, "and to a sub-lessee, to whom the lessee had legally sublet the "land before his insolvency, and who in contemplation of the "lease continuing to its end had made such improvements." The same learned judge having invoked the principle that "the "presumption against forfeiture of property in any shape or form "lies at the root of the well-known maxim of our law that no one "shall be enriched at the expense of another" observed that there was no difference in principle, although there might be in degree, between the case of a lease being abruptly terminated by the operation of a special law, and that of a bona fide possessor making improvements in the belief that he will have the permanent enjoyment of them. Here, then, was the case of an improver who, lawfully occupying under a lease and in that capacity making improvements, was entitled to compensation because his occupation was prematurely determined.

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[4] (1895) 12 S.C. 179 (Cape of Good Hope).

In *Rubin* v. *Botha*[5] the essential facts closely resembled those of the present case, and the decision derives special importance from the fact that it was that of Lord de Villiers C.J., Innes J. and Maasdorp J.P. There the plaintiff and defendant entered into an agreement of lease under which the plaintiff was to have the use and occupation of a portion of the defendant's farm for 10 years without payment of rent, and was to erect a building thereon which, at the expiration of that period, was to become the property of the defendant. After the plaintiff had erected the building and been in occupation of the building for three years the defendant gave him notice to quit on the ground that the agreement was null and void as not having been executed as required by the Transvaal law. It was held that the plaintiff was entitled to be paid for the improvements to the extent to which the value of the defendant's farm had been improved thereby, less the value of the plaintiff's use and occupation for three years. There was a difference of opinion as to the quantum of compensation, which does not arise in the present case, but there was unanimity upon the right to some compensation. Some passages may be quoted from the judgment of the Chief Justice, with whom Maasdorp J. agreed. "The present case," he said,[6] "differs from the many cases in the Cape Supreme Court relating "to the compensation payable to the owner of land by the person "effecting improvements thereon in this respect, that the "improvements were made by a person who knew that he was "not the owner and intended that the buildings should become "the property of the owner, but believed that he would, as lessee, "enjoy the use and occupation for the full period contemplated "by the lease executed between him and the owner. That lease "proved to be null and void by reason of its not being notarial, "and the question to be determined is what should be the basis "of the compensation admittedly payable by the defendant to "the plaintiff." The learned Chief Justice then referred to his decision in *Bellingham* v. *Bloommetje*,[7] which has already been cited, and to the authority of Groenewegen upon which it had been decided, and said[8]: "Lessees, as has often been pointed "out in the Cape cases, especially in *De Beers Mines* v. *London* "*& South African Exploration Co.*,[9] stand on a different footing

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[5] 1911 A.D. 568 (South Africa).
[6] Ibid. 574.
[7] 1874 Buch. 36.
[8] 1911 A.D. 568, 575 (South Africa).
[9] (1893) 10 Juta 359.

"from other occupiers as their rights have been defined by special "legislation. Where, however, as in the present case, the "relation of lessor and lessee does not exist between the owner "and the occupier by reason of the agreement of lease proving "null and void, there is no valid reason why the basis of compensation applicable to lessees should be applied to improvements made by the occupier." Then, after referring to the already cited case of *Parkin* v. *Lippert*,[10] the Chief Justice said [11]: "The plaintiff was not a 'possessor' in the strictly juristic sense "of the term, but he was a bona fide occupier, who believed he "had the right, not only of occupation, but of erecting the "buildings on the land so occupied. True it is that he intended "that the building should become the property of the defendant, "but only upon the expiration of the 10 years during which the "occupation was to last. The defendant took advantage of "the law which, by declaring the lease to be void, frustrated the "true intentions of both parties, and there appears to me to be no "reason in the world why he should not be subject to the equitable rule of the Dutch law that no one should be enriched to "the detriment and injury of another." Then a little later [12]: "The defendant in the present case took advantage of the law, "which declared his agreement to be void, and he cannot insist "upon compensation being payable as if the lease had been a "valid one."

Their Lordships have referred at length to this case both because it appears to them to apply in an unimpeachable way the cardinal principle of Roman-Dutch law in regard to unjust enrichment, and because it was ignored in the leading case of *Soysa* v. *Mohideen*,[13] to which they will presently recur. But before doing so they will mention *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*[14] In that case again the defendants had leased a piece of land but had by mistake sunk a well beyond its boundary within the plaintiff's land. The plaintiff bringing an action for ejectment, the defendants claimed compensation for the improvement effected by the sinking of the well. The court (consisting of Innes C.J., Solomon J.A. and Maasdorp J.A.) considered and applied *Rubin* v. *Botha* [15] and held that they were entitled to it. There is much in the judgments of all three judges which illuminates the principle, but their Lordships think it sufficient to cite a single passage from the judgment of the Chief Justice [16]: "But it [*Rubin* v. *Botha*] certainly did decide that a person who "had made improvements upon the land of another, not as "possessor, but under the mistaken idea that he was lessee, was "entitled to compensation on the same basis as a possessor, "subject to an equitable deduction necessitated by the special "circumstances."

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[10] 12 S.C. 179 (Cape of Good Hope).

[11] 1911 A.D. 568, 576 (South Africa).

[12] Ibid. 577.

[13] 17 N.L.R. 279.

[14] 1915 A.D. 636 (South Africa).

[15] 1911 A.D. 568 (South Africa).

Why, then, it must be asked, did the court in the present case deny to the fifth defendant the right to compensation, thereby depriving him of the fruit of his labours and expense and permitting the unjust enrichment of the co-heirs? The answer is found in *Soysa* v. *Mohideen* [17] which, rightly perhaps, appeared to them to be a binding authority. It must therefore be closely examined. Two important points were raised in the case, only one of which is relevant to the present question, and the facts can be shortly stated. A parcel of land which was subject to a fideicommissum had been occupied by the defendant in the action as lessee of one of the fiduciarii who was entitled to one half of the property and had agreed to pay him half the value of the buildings upon the termination of the lease. The plaintiffs, the fidei commissarii (the fiduciarii having died), successfully challenged the validity of the lease, whereupon the defendant claimed to retain possession of the land until the plaintiffs paid him half the cost of his improvements. This claim was rejected by the court, and once again their Lordships must cite considerable passages of the judgment, pointing out with respect how error has found its way into their conclusions. At a first hearing before Lascelles C.J. that learned judge said [18]: "I think that there can be no doubt "that under the Roman-Dutch law a lessee had not the jus "retentionis which would entitle him to remain in possession "against a successful claimant until he has been compensated for "improvements. The occupation of a lessee is not possessio "civilis, for he does not occupy the property in the belief that it "is his own. On the contrary, his interest in the property is "defined and limited by the terms of the lease." The learned Chief Justice thought that the uncertainty which existed upon that branch of the law should be set at rest and adjourned the case for re-argument before the Collective Court. The observation that has been cited proved to be the basis of the judgment of that court. The Chief Justice himself added little to his previous judgment. De Sampayo A.J. opens the relevant part of

[16] 1915 A.D. 636, 647 (South Africa).

[17] 17 N.L.R. 279.

[18] Ibid. 281.

his judgment with the words[19]: "A lessee is not a bona fide "possessor, and is therefore not entitled to compensation for "improvements on that footing." Their Lordships observe that he, like the Chief Justice, assumes that he is dealing with a claim by a lessee, whereas the very basis of the claim is that the lease has been repudiated and that he cannot claim under it. In the words of Lord de Villiers, he was not a possessor in the strict juristic sense but he was a bona fide occupier who had effected improvements in the mistaken belief that he would enjoy them for the term of the lease. The learned judge proceeded to distinguish other cases upon which their Lordships do not think it necessary to pronounce. His judgment was, in their Lordships' view, vitiated by the original erroneous assumption. None of the cases in the South African courts, to which reference has been made, were noticed by the court. Pereira J. fell into the same errors. After stating that it was well settled law in the colony that, in order to be entitled to compensation for improvements, a person should have not only possession of the property but bona fide possession of it, and that by "possession" is here meant what is known to the civil law as the possessio civilis as distinguished from the possessio naturalis, he held that a lessee has not possessio civilis of the land that he enjoys under the lease, for he knows that the land he enjoys does not belong to him: therefore he is not entitled to compensation for improvements. The question whether or not the possession of a lessee is possessio civilis may be open to argument. But in this context it is beside the point. For, as already stated, the claim made by the defendant in the case under review (like the claim made by the appellants in the present case) was not made qua lessee but in respect of the bona fide occupation of land under a lease which had been repudiated. It would, as their Lordships think, be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must accordingly pronounce that this case was wrongly decided, and have the less reluctance in doing so because, long though the decision has stood, no questions of title can be affected by a contrary view of the law.

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[19] 17 N.L.R. 279, 284.

But though this decision has stood for so many years, there have been in the courts of the Island of Ceylon cases which, in principle, are not easy to reconcile with it. Thus, in *Hevawiterane* v. *Dangan Rubber Co. Ltd.*[20] (a case decided shortly before *Soysa* v. *Mohideen*[21]) it was held that a "bona fide possessor" need not necessarily be the owner of the property possessed, nor need he have a legal right to possess it, but that it is sufficient if his possession is the result of an honest conviction in his mind of a right to possess. These words were quoted with approval by Wood Renton A.C.J. from Pereira, Right to Compensation, and were not dissented from by the same Pereira J. who was a party to the decision in the later case. It would seem that a discrimination between these two cases can only rest upon a confusion as to the capacity in which a person, who thought he occupied under a valid lease but did not, claims.

A case which usefully illustrates the spirit in which the principle has been developed is *Government Agent, Central Province* v. *Letchiman Chetty*.[22] There the relevant facts (taken from the headnote) were that the Government Agent took steps to acquire a swamp under the Land Acquisition Ordinance but suspended it. On the outbreak of plague he entered into possession under the Plague Regulations and, in anticipation of the conclusion of the acquisition proceedings, improved the land by filling it and draining it with drains which extended out of the land. No formal order of possession was obtained under the Land Acquisition Ordinance. At this stage the scheme was modified, and the old proceedings under that ordinance were abandoned and new proceedings started. The question then was whether the land should be valued as at the date of the award in those proceedings, or whether the Government Agent was entitled to compensation for improvements effected by him while he was in possession. He was held to be so entitled upon the ground that he was a bona fide possessor. For a person who takes possession of land and executes improvements upon it in expectation of a formal title which in good faith he believes himself certain to obtain may be such a possessor. Bertram C.J., in a weighty and learned judgment, treats of the development of the law, observing[23]: "In my opinion it would be a most unfortunate "position if the law had not developed principles which would "enable it to deal justly with such a case." In that case the question was mainly whether the possession was mala fide or bona fide. No doubt appears to have been entertained that if there was bona fides a valid claim to compensation was established. Again, it appears to their Lordships that upon any equitable principles it is unjustifiable to deny to an evicted lessee compensation which is awarded to one who has no title at all however firm may be his belief that he will get one.

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[20] (1913) 17 N.L.R. 49.

[21] 17 N.L.R. 279.

[22] (1922) 24 N.L.R. 36.

[23] Ibid. 40.

Reference must now be made to *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.*[24] In that case there was much discussion of the rights of a lessee in respect of improvements and Garvin A.J. said[25]: "It is well settled law that in Ceylon a lessee who has "improved his leasehold cannot maintain a claim for compensa-"tion in respect of these improvements against a third party who "establishes a title superior to that of his lessor from a source "other than the lessor. The law was declared in this sense in "*Soysa* v. *Mohideen.*[26] Since the decision of that case nothing "new has been discovered in the writings of the jurists." The learned judge then referred to the two South African cases which have already been examined, *Bellingham* v. *Bloommetje*[27] and *Rubin* v. *Botha*[28] and said[29]: "In neither of these cases was "compensation granted to the improver in his character of lessee "of the property improved. Indeed, it was the circumstance that "he was not in law the lessee of the premises which enabled him "to contend that he was a possessor who entered upon the "premises bona fide, and with the intention of holding and "enjoying the premises, if not as owner, at least for a specified "period of time, and entitled in equity to a measure of compensa-"tion assessed on that footing." It is difficult to understand why the acknowledged principle of those cases did not apply to the case before the learned judge. But at least he did not dissent from it, and the high authority of Garvin J. may be said to reinforce that of the distinguished South African judges who affirmed the right to compensation in such a case.

In *Jasohamy* v. *Podihamy*[30] the right of compensation for improvements was extended to a usufructuary who made improvements with the consent and acquiescence of the owner. The interest of the case lies in the fact that Keuneman J. cites from Wille's Principles of South African Law, 1937 ed., p. 353, the passage which has already been quoted. It will be observed that

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[24] (1923) 25 N.L.R. 267.
[25] Ibid. 269.
[26] 17 N.L.R. 279.
[27] 1874 Buch. 36.
[28] 1911 A.D. 568 (South Africa).
[29] 25 N.L.R. 267, 269.
[30] (1943) 44 N.L.R. 385.

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the generality of the statement of the relevant law in this citation does not exclude the case of a person who occupies land and improves it in the mistaken belief that he is a lawful lessee. This view is enforced by the fact that the learned judge then refers without disapproval to *Rubin* v. *Botha*[31] and *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*[32]

Counsel referred their Lordships to many other cases in which, as he contended, the courts of Ceylon had sought to mitigate the rigour of the law as laid down in *Soysa* v. *Mohideen*[33] by means of the doctrine of acquiescence or otherwise. But they think it unnecessary to examine them and will return to the case under appeal. As already observed, the judges of the Supreme Court founded their judgment on *Soysa* v. *Mohideen* and, in particular, on the passages that have already been cited from the judgment of Pereira J. H. N. G. Fernando J. concludes the relevant part of his judgment by saying that, having considered many of the cases subsequent to *Soysa*, he would hold that none of them had in any way qualified the principle therein laid down that the rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as against the fideicommissary owners who were not parties to the contract. This passage serves to emphasise in the clearest way the error which permeates *Soysa's* case[34] and the case under appeal. In that case, as in this, the claim of the improver was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. It is beside the mark to discuss whether the possession of a lessee is civilis or naturalis, for it is not as lessee that the claim is made. It is, on the contrary, because he is denied his contractual rights by the premature termination of the lease, that he asserts his claim to compensation. Their Lordships entertain no doubt that in allowing it they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago.

As they take this view upon the main question that was argued, their Lordships do not think it necessary to discuss an alternative claim, which was founded on the view that the lessor, Zaneera Umma, was entitled to compensation as between herself and her co-heirs, and that by subrogation the fifth defendant, and therefore the appellants, are entitled to the benefit of her claim. This is a matter which may in some other case call for determination. It is unnecessary and would be inexpedient to deal with it now.

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[31] 1911 A.D. 568 (South Africa).

[32] 1915 A.D. 636 (South Africa).

[33] 17 N.L.R. 279.

[34] Ibid.

Their Lordships are satisfied that the final adjustment of the rights of the parties, including the party claiming compensation as an improver, can and should be made in the partition suit. The amount of compensation, if payable, has not been disputed, nor has any equitable plea been advanced for its reduction.

Their Lordships will therefore humbly advise Her Majesty that the order of the Supreme Court should be set aside, that the order of the District Court should be restored so far as it directed the sale of the property in accordance with the provisions of the Partition Act, 1951, and the bringing of the proceeds of sale into court to abide further order and the payment of costs, but that provision should be made by such further order for paying the sum of Rs.25,125.45 thereout to the appellants in priority to the beneficial interests of other parties.

The respondents must pay the costs of the appellants in the Supreme Court and of this appeal.

Solicitors: *Fisher, Dowson & Wasbrough.*

C. C.

[HOUSE OF LORDS.]

H. L. (Sc.)*
1959
Nov. 23, 24;
Dec. 15.

PARKER AND OTHERS . . . . . . APPELLANTS;

AND

LORD ADVOCATE . . . . . . RESPONDENT.

Revenue—Estate duty—Property chargeable—Property deemed to pass—Settlement—Income payable to children during life of parent—On parent's death capital to be divided among survivors—Interest passing—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*d*)*—Finance Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 32), *s.* 28.

By section 2 (1) of the Finance Act, 1894: "Property passing "on the death of the deceased shall be deemed to include the "property following . . . (d) any annuity or other interest pur-"chased or provided by the deceased . . . to the extent of the

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

"beneficial interest accruing or arising by survivorship or otherwise "on the death of the deceased."

By section 28 of the Finance Act, 1934, for the purposes of the foregoing section the extent of any such beneficial interest "shall "be ascertained and shall be deemed always to have been ascertain-"able, without regard to any interest in expectancy the beneficiary "may have had therein before the death."

A truster transferred certain investments to trustees for behoof of her three children. The trust deed provided that during her lifetime the children were to be paid the whole income of the trust fund equally among them with provision for the event of any of them dying leaving issue or not leaving issue; on the death of the truster the trust fund was to be divided into three equal parts and one part paid to each child as his or her absolute property. There was a destination over in favour of issue of predeceasers and a survivorship clause. The truster died, survived by the three children, all of full age:—

Held, that estate duty was rightly levied on the whole of the capital of the trust. Before the death the right of each beneficiary was to the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster; after the death a surviving beneficiary became entitled to one-third of the fund absolutely and this was the extent of the interest deemed to be included in the property passing on the death. The rights which then accrued were substantially different in kind from any previously enjoyed in respect of which no deduction could be made.

In re Parkes' Settlement [1956] 1 W.L.R. 397; [1956] 1 All E.R. 833 and *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403 considered.

Decision of the Second Division of the Court of Session, 1958 S.C. 426 affirmed.

APPEAL from the Second Division of the Court of Session.

This appeal was brought by leave granted by the Second Division of the Court of Session from an interlocutor of that Division dated July 9, 1958, whereby their Lordships refused an appeal brought by the appellants, George Coats Parker, Marie Symington Parker and Eliza Balfour Parker, the trustees acting under a deed of declaration of trust by them and others dated April 21, 1938, and registered in the Books of Council and Session on August 9, 1938. The appeal was brought under section 10 of the Finance Act, 1894, against an assessment to estate duty dated November 15, 1957, made by the registrar, Estate Duty Office, on behalf of the Commissioners of Inland Revenue, for and on behalf of whom the Lord Advocate appeared as respondent in this appeal.

The facts, stated by Lord Keith of Avonholm, were as follows: The deed took the form of a declaration of trust, dated April 21, 1938, in respect of certain investments transferred to the trustees by a Mrs. Parker (the truster) for behoof of her three children. Mrs. Parker died on February 16, 1956, survived by her children, who had all attained majority. The material clause was as follows: "During the lifetime of the said Mrs. Eliza Balfour Coats or Parker "the whole income of the trust fund shall, after deduction of the "expenses of administration be paid and made over to the said "children equally between them, and in the event of any of them "dying leaving issue, such issue shall take, equally among them, "per stirpes the share of income to which their parent would "have been entitled on survivance, and in the event of any of the "said children dying without leaving issue, the share of income "of such predeceaser shall accrue to the survivors equally "between them and on the death of the said Mrs. Eliza Balfour "Coats or Parker, the trust fund shall be divided into three "equal parts, and one part shall be paid over to each of the said "children as their absolute property and that either by transference of the investments then constituting the trust fund, or by "realisation of the trust fund and payment in cash, or partly in "the one way and partly in the other, in the absolute discretion "of the trustees: and in the event of any of the said children "predeceasing the said Mrs. Eliza Balfour Coats or Parker leaving "issue, such issue shall take equally among them per stirpes, "the share of capital to which their parent would have been "entitled on survivance; declaring, however, that during the "minority of such issue, the trustees shall retain the share of "capital to which such minor issue would have been entitled, and "shall pay to them the income therefrom during minority and "the capital only on such issue attaining majority: and in the "event of any of the said children predeceasing the said Mrs. "Eliza Balfour Coats or Parker without leaving issue the share "of capital effeiring to such predeceaser shall be divided equally "among the survivors, and the issue, per stirpes, of any of the "said children who may have predeceased leaving issue; declaring further that no interest in the trust fund shall vest in any "of the beneficiaries thereunder until the death of the said Mrs. "Eliza Balfour Coats or Parker."

An assessment for estate duty was made on the entire trust fund in respect of the death of Mrs. Parker under section 2 (1) (*d*) of the Finance Act, 1894. The trustees appealed to the Commissioners of Inland Revenue, who upheld the assessment. and the trustees then appealed against the assessment to the Court of Session. The appeal was heard by the Second Division of the Court of Session, who refused the appeal and granted leave to appeal to the House of Lords.

John Pennycuick Q.C. (of the English Bar) and *W. J. Stewart* (of the Scottish Bar) for the appellants. To find what beneficial interest accrues, within the meaning of section 2 (1) (*d*) of the Finance Act, 1894, under a disposition, one must first find what rights of enjoyment in possession the beneficiary had immediately prior to the death on which the property passed. When this is found the value of the rights enjoyed prior to the death must be deducted from the value of the rights enjoyed after the death; duty must be paid only on the excess of the latter over the former, that is, on any enlargement of interest arising on the death. One must disregard interests in expectancy, but section 28 of the Finance Act, 1934, has no application to the enlargement of an interest which is in possession before the death.

Adamson v. *Attorney-General*[1] and *Attorney-General* v. *Lloyds Bank Ltd.*[2] were concerned with interests in expectancy. Admittedly the trust fund is an "interest . . . provided by the "deceased" within the meaning of section 2 (1) (*d*), and any beneficial interests which can be shown to have accrued or arisen to the three children on her death must attract estate duty, according to their extent, when properly ascertained. Certainly some beneficial interests so accrued or arose, but they did not extend to the whole capital of the trust fund, since previously the children were entitled to beneficial interests in possession in the income, and allowance should be made for these, because after the death of the deceased the children simply continued to be entitled to the income under the provisions of the deed.

The two questions to be answered are: (1) Did the deceased purchase or provide an interest? (The answer to this is, Yes.) (2) To what extent did that interest accrue or arise on her death?

This problem arises in all cases in which during a settlor's life the beneficiary concerned has some interest in possession and, on the settlor's death, secures the absolute interest or fee. There are cases in which the beneficiary is, in any event, entitled to the enjoyment of the fund for his whole life. The present case is an example of this. There are other cases in which there is a trust for a beneficiary absolutely subject to defeasance in the event of the birth of issue to the settlor, when the fund goes over at once from the beneficiary to the issue. Similarly there may be an overriding power of appointment. In all these cases the beneficial interest which accrues or arises to the beneficiary on the death of the settlor is the removal of the risk that he will be deprived of the enjoyment of the fund, a view which corresponds with the reality of the matter: see *Adamson's* case.[3] In the first type of case the beneficial interest which accrues or arises must be confined to the interest in reversion. The position in those cases is that the beneficiary, before the death of the settlor, is entitled at least to the whole income during his (the beneficiary's) life. That is not subject to any possibility of defeasance or any prior interest and it is a right in possession. The beneficiary could make an assignment of the whole income during his life and give a good title to the assignee. The fee which accrues on the death must be diminished by the element which he already has in possession, that is, the income right. One could frame a deed with precisely the same substantive effect as the present deed in such a way that there could be no question but that the liability to duty would be reduced as the appellants contend. It cannot be right to say that if one finds two settlements expressed in different conveyancing language but each conferring identical rights of enjoyment, there will, in the one case, be liability to duty on the whole corpus while, in the other case, there will not. That would make liability to duty depend on mere labels instead of on rights of enjoyment. One must look at the terms of the settlement and ascertain what rights of enjoyment they confer. In this case each of the children had a single continuing interest in the trust estate during the truster's life, and the only effect of her death on that interest was to enlarge it.

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[1] [1933] A.C. 257 (H.L.); 49 T.L.R. 169.

[2] [1935] A.C. 382 (H.L.).

As to the principles on which a Finance Act is applied to Scotland, see *Lord Advocate* v. *Countess of Moray*.[4] Fiscal statutes will be so interpreted as to impose like burdens in England and Scotland on interests which are substantially alike. See also *Income Tax Commissioners for City of London* v. *Gibbs*.[5]

Adamson v. *Attorney-General*[6] explains the general scheme of section 2 (1) (*d*) of the Act. That case is explained in *Attorney-General* v. *Lloyds Bank Ltd.*[7]

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[3] [1933] A.C. 257.

[4] [1905] A.C. 531, 544 (H.L.); 21 T.L.R. 715.

[5] [1942] A.C. 402, 414 (H.L.); [1942] 1 All E.R. 415.

[6] [1933] A.C. 257.

[7] [1935] A.C. 382.

The only beneficial interest accruing or arising on the death of the truster is the removal of the risk of losing possession by predeceasing the truster, or, alternatively, the interest which accrues or arises is such interest as the beneficiary did not have at the time of the death, so that the measure of that interest is the value of a reversion upon a full life interest.

The appellants rely on *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*.[8] See also *Coutts & Co.* v. *Inland Revenue Commissioners*.[9] *In re Parkes' Settlement*[10] was correct as to the annuities but not as to the corpus. One must look at the trust fund and see how much richer the beneficiary is than he was before. The line is to be drawn at interests in possession. In valuing the corpus for the purposes of estate duty one must exclude any interest for life which the beneficiary had before the death of the settlor. There is no difficulty if the line is drawn at interests which were in possession before the death: see Hanson on Death Duties, 10th ed., p. 275, para. 631, *Grey* v. *Pearson*[11] and *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*.[12]

Take the case of a settlement the effect of which is to give the income of the trust fund to A.B. for life, the fund being held on the death of the settlor in trust for A.B. absolutely, but if A.B. predeceases the settlor, then in trust for X. On the execution of the settlement A.B. has a full life interest in the proceeds of the trust fund, and on the death of the settlor that interest comes to an end by merger in the fee, but so far as the income goes no new interest arises to A.B. because he already has it. The same is true of the present case. The beneficiary has the right to the income during his whole life; although on the truster's death his interest is enlarged into a fee, the income element is still there. He could have disposed of his life interest before the settlor's death.

This is in accord with the terms of section 2 (1) (*d*) and the apparent policy of the Act, the relevant words being "to the "extent of the beneficial interest accruing or arising by survivor-"ship or otherwise on the death of the deceased." Following those words, where a beneficiary already has an interest in possession in the income, then to that extent no new beneficial interest accrues or arises on the settlor's death, because it is something which he already has: see *In re Townsend.*[13]

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[8] [1953] A.C. 347, 361, 363–364, 366–367, 369, 374–375, 377–378 (H.L.); [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.

[9] [1953] A.C. 267, 283 (H.L.); [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418.

[10] [1956] 1 W.L.R. 397, 407–408, 408–409, 411 (C.A.); [1956] 1 All E.R. 833.

[11] (1857) 6 H.L.C. 61 (H.L.).

[12] [1958] A.C. 210, 229–230 (H.L.); [1957] 3 W.L.R. 127; [1957] 2 All E.R. 745.

The rule relied on by the appellants is not imprecise. It operates with certainty in any given case, whereas otherwise it is not clear what rule should be adopted. To impose duty on the whole corpus would be out of all proportion to the interest which arises. There is no difference in substance between the position in the present case and that which would exist under a similar English settlement.

The value of the beneficial interest should be assessed by calculating the amount (if any) by which the beneficiary's interest immediately after the truster's death exceeded the value of that interest before her death. This should be done either (a) by taking into account the fact that immediately before her death she was in articulo mortis so that the risk of a beneficiary predeceasing her was negligible and the value of his interest then was almost equal to the capital value of his share, or (b) by calculating the difference in value actuarily by reference to the ages of the truster and the beneficiaries and their eventual interests.

William Grant Q.C., Solicitor-General for Scotland (of the Scottish Bar), *E. B. Stamp* (of the English Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondent. A beneficial interest in one-third of the trust estate accrued or arose to each of the truster's children by survivorship or otherwise on her death. The assessment is well founded because the whole of the trust funds are deemed to pass on her death by virtue of section 2 (1) (*d*) of the Act of 1894 and no deduction should be made in respect of any interest which the children had before her death.

An interest in the trust fund was provided by the truster and a beneficial interest in it arose or accrued on her death. The whole issue in this case is: what was that beneficial interest? Was it merely an enlargement of a continuing interest which the children previously enjoyed? Or was it different in kind from that which the children previously had? The latter is correct. Under the deed there was no continuing right to the income after the truster's death. That is the crux of the whole case. Before the truster's death each of the children had a present right to a share of the income during the joint lives of each one of them and of the truster. Quoad the income each had only a personal right to a share of it so long as each was living; quoad the capital each had merely an "interest in expectancy" within section 28 of the Finance Act, 1894, if he survived the truster. After the death it was because the beneficiaries had acquired the absolute untrammelled right to the capital that they could deal with the income, not because of anything that had gone before: see *Inland Revenue* v. *Clark's Trustees*.[14] On the death of the truster one equal third share of the capital vested in each child and for the first time that child became indefeasibly entitled to it in possession. The interest which accrued to each by reason of survival was different in nature and quality from the interest which had gone before.

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[13] [1901] 2 K.B. 331, 334.

The deed here is in simple terms with few technicalities. It makes a gift of income during the life of the truster and is limited in terms to her life. It is impossible to postulate a continuing life interest before and after her death. On her death there arises a new and different right to capital, one different in kind and quality from any interest which the beneficiaries had before. The interest in the income ceased; that is in accordance with the authorities. The interest after the death was one which the beneficiaries did not have before and the appellants cannot spell out a continuing interest. This case is on all fours with *In re Parkes' Settlement*.[15] The reasoning of the Master of the Rolls there and of Jenkins L.J. is relied on. If one had a bundle of rights continuing before and after the death, section 2 (1) (*d*) would operate only on the accretion, but here there is not a continuing right with something grafted onto it. The crux of the matter is expressed by Lord Patrick in the court below.[16]

In *Adamson's* case[17] the tax paid was arrived at by compromise and not on an actuarial basis.

E. B. Stamp following. The argument for the appellants rested on the proposition that in order to succeed it must be shown that the interest in possession in the income extended over the whole lives of the beneficiaries each of whom could have sold his life interest in the fund. That is not so. It can be tested by supposing that a beneficiary agreed to sell to an insurance company all the income to arise from one-third of the trust fund during the residue of his life. If the solicitor of the insurance company had investigated his title, he would have found it plain that there was no title to income from one-third of the trust fund during the remainder of the beneficiary's life but only during the joint lives of himself and the truster. He could also sell the income from whatever investments were transferred to him on the truster's death, but that would not be what he was agreeing to sell. After the truster's death there would be a new trust. There would be a difference in substance. Further, on the truster's death there would be a claim for death duties.

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[14] 1939 S.C. 11, 24.
[15] [1956] 1 W.L.R. 397.
[16] 1958 S.C. 426, 434–435.
[17] [1933] A.C. 257.

John Pennycuick Q.C. in reply. It is agreed that an interest in fee is different in kind from an income right, but one cannot stop there; one must see what rights of enjoyment are comprised in the fee. It is not so simple as to say that one interest is in income and the other in fee, that one stops and the other begins. The House should lay down the principles applicable in such cases as these. On this point Dymond on Death Duties is non-committal. In the last editions of Green on Death Duties and Hanson on Death Duties the previous statements were modified by reason of *In re Parkes' Settlement.*[18]

Their Lordships took time for consideration.

Dec. 15. VISCOUNT SIMONDS. My Lords, I am so fully in agreement with the opinion given by their Lordships of the Second Division of the Court of Session that I can be very brief.

In the month of April, 1938, the late Mrs. Parker, whom I will call " the truster," transferred certain investments to trustees for behoof of her three children. The trust deed (which is sufficiently and accurately described by the learned Lord Justice-Clerk in these terms [1]) " provided that during the truster's lifetime " the three children were to be paid the whole income of the trust " fund equally among them with provision for the event of any " of the children dying leaving issue or dying without leaving " issue. On the death of the truster the trust fund was to be " divided into three equal parts and one part paid over to each " child as their absolute property. There was a destination over " in favour of issue of predeceasers and a survivorship clause. " Vesting in the fee was clearly postponed to the date of the " parent's death."

The truster died on February 16, 1956, survived by her three children. All of them had then attained their majority. On the death of the truster the respondent claimed that estate duty was payable upon the whole of the trust fund under section 2 (1) (*d*) of the Finance Act, 1894, upon the footing that the trust fund was an interest provided by the truster, and that a beneficial interest accrued to the three children on her death, and that the extent of that beneficial interest was the whole corpus of the fund. This claim, which was resisted by the appellants, was held to be well founded by the Court of Session. Hence their appeal to this House, and, in spite of the strenuous and ingenious arguments of Mr. Pennycuick on their behalf, I have no doubt that the decision was right.

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[18] [1956] 1 W.L.R. 397.

[1] 1958 S.C. 426, 430.

It must be asked: what were the rights of the beneficiaries before and after the death of the truster? Before the death it was the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster: the beneficiary had no right in the corpus of the fund: vesting was expressly postponed until the truster's death. After the death the child, if surviving the truster, became entitled to one-third of the fund absolutely. The beneficial interest that then arose or accrued to each child was an absolute interest in one-third of the corpus subject to the expenses of administration and distribution and duties, if any. This, then, and nothing more nor less was the extent to which the interest provided by the truster must be deemed to be included in the property passing on her death.

The answer to this claim, as I understand it, is that in order to ascertain what beneficial interest so accrues under a disposition it must first be asked what rights of enjoyment in possession the beneficiary had immediately before the death upon which the property passed. Then, the argument proceeds, the value of the rights enjoyed before the death is to be deducted from the value of the rights enjoyed after the death, and duty is payable only on the excess of the one over the other. In other words, it was argued that duty is exigible only in respect of any enlargement of interest arising on the death. But this is a contention for which I can find no justification, except perhaps within very narrow limits. I would reserve the question whether in *In re Parkes' Settlement*[2] it was correctly decided that duty was not payable in respect of the annuities to which the daughters were entitled on the death of the settlor. In that same case the difference is emphasised between the case in which the rights of the beneficiary merely become more valuable, and that in which such rights are materially changed upon the death. In regard to the latter, my noble and learned friend, Lord Jenkins, said, in respect of the interest accruing to the children upon the death of the settlor[3]: "I find it impossible consistently with the ratio "decidendi in *Adamson's* case[4] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[5] to hold "that such vested interest in capital was not a beneficial interest "accruing or arising on the death of the deceased within the "meaning of section 2 (1) (*d*)." So here, the rights that accrued or arose upon the death of the truster were substantially different in kind from any rights previously enjoyed by the children, and no deduction can be made for any rights previously enjoyed.

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[2] [1956] 1 W.L.R. 397 (C.A.); [1956] 1 All E.R. 833.

I would dismiss the appeal with costs.

LORD RADCLIFFE. My Lords, I agree that the appeal should be dismissed.

The only question that we have to consider is how to apply the provisions of section 2 (1) (*d*) of the Finance Act, 1894, to the interests accruing or arising under this particular declaration of trust dated April 21, 1938. I do not pretend that I understand or can reconcile all that has been laid down judicially about the meaning or effect of this subsection, the purport of which seems to become only the more elusive with each authoritative explanation of what it is: but, even so, if one is to determine what were the beneficial interests which accrued or arose on the death of the settlor, Mrs. Parker, I do not see how one is to avoid going to the settlement itself and ascertaining what was the exact nature of the interests which were created by its particular terms.

I am afraid that I cannot get out of this settlement anything that will aid the argument of the appellants. During the lifetime of Mrs. Parker each child was entitled to receive the income of a share of the trust fund during his life. He was also entitled (a) to certain contingent interests in expectancy by way of accruer of the other children's shares of income during Mrs. Parker's life, and (b) to an interest in expectancy contingent on his surviving Mrs. Parker in his share of capital and, subject to contingencies, in the other shares as well. On Mrs. Parker's death each child who survived her found that his right to receive the income of a share of the trust fund came to an end, and that what the settlement provided for him was a right to have made over to him a corresponding share of the capital of the fund as his own absolute property.

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[3] [1956] 1 W.L.R. 397, 412.

[4] [1933] A.C. 257 (H.L.); 49 T.L.R. 169.

[5] [1953] A.C. 347 (H.L.); [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.

In my opinion, the beneficial interest that thus accrued or arose to him was that right to capital, with all its incidental rights and advantages. I cannot see that the value of that right (which, under section 28 of the Finance Act, 1934, has to be ascertained without regard to the pre-existing interest in expectancy) can be reduced by the circumstance that under the settlement it had been preceded by an interest for the same child's life which was limited to cease on the death of Mrs. Parker. It may be correct to speak of that interest as being enlarged by the death: but it seems to me that what is important for the purpose of section 2 (1) (*d*) is that it was the death that was the occasion of the contingent right to capital becoming absolute and displacing the previous limited right which had come to an end.

LORD COHEN. My Lords, the question for your Lordships' decision is as follows: Whether on the true construction of a deed of declaration of trust registered on August 9, 1938, and of section 2 (1) (*d*) of the Finance Act, 1894 (as amended by section 28 of the Finance Act, 1934), estate duty became payable on the death of the truster, Mrs. Eliza Parker, on the principal value of the trust property on the footing that a beneficial interest in one-third thereof thereupon accrued or arose to each of her three children, or whether, as the appellants contend, each of Mrs. Parker's children had a single continuing interest in the trust estate during Mrs. Parker's life, the only effect of her death upon that interest being to enlarge it.

The relevant trust purposes were, first, payment of the expenses of the administration of the trust; secondly, during the lifetime of the truster the whole income of the trust fund, less the expenses of administration, was payable to the three children equally between them. If any of them died leaving issue, the issue should take equally between them per stirpes the share of income to which his or her parent would have been entitled on survivance. If any of them died without leaving issue the share of income of such predeceaser should accrue to the survivors equally between them. On the death of the truster the trust fund was to be divided into three equal parts and one part paid over to each of the three children. If any child predeceased the truster leaving issue, the issue should take the parent's share. If any child predeceased the truster without leaving issue, his or her share of capital should be divided equally among the survivors and the issue of any children who predeceased leaving issue.

The Commissioners of Inland Revenue assessed the funds held under the deed of declaration of trust to estate duty under section 2 (1) (*d*) of the Finance Act, 1894, upon the footing that the entire trust fund was liable to estate duty because beneficial interests in the entire trust fund accrued or arose on the death of the truster.

Before the Inner House, as before your Lordships, the appellants contested the correctness of this assessment, arguing that each of the children had a single continuing interest in the trust fund from the date of its execution, and that the only beneficial interest accruing or arising on the truster's death was the disappearance of the risk of his predeceasing the truster, or, alternatively, that the measure of the accruing interest was the value of a reversion upon a full life interest.

The Inner House unanimously rejected these contentions. I respectfully agree with them. I should be content to adopt the language of Lord Patrick in the concluding paragraph of his judgment where he said [6]: "Before the death of the truster the "children, according to Scots law, had no interest of any kind "in the trust fund. They had only a right to call on the trustees "to administer the trust property so as to give them the income "resulting from that administration according to the provisions "of the trust—see *per* Lord President Normand in *Inland* "*Revenue* v. *Clark's Trustees*.[7] After the death of the "truster the trust came to an end. Each child then owned the "corpus of one-third of the trust fund. Each child's enjoyment "of income would now depend on his or her own disposition, "provident or otherwise, of the share of the trust fund owned "by him or her. Ownership of the tree carries with it as an "accessory the right to the fruits of the tree, but a right to the "fruits of a tree as cultivated by oneself is a very different thing "from a right to share in the fruits of an orchard cultivated by "others. As I view the matter, a share of the capital of the "trust fund accrued or arose to each child at the date of "the truster's death. The capital of the trust fund must there"fore in terms of subsection 2 (1) (*d*) be deemed to have passed "at that date. The children's rights to the fruits of their respec"tive shares of the capital after the truster's death are a mere "accessory to their ownership of their shares of the capital of "the trust fund. These rights certainly accrued and arose in a

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[6] 1958 S.C. 426, 434–435.

[7] 1939 S.C. 11, 24.

"literal sense to the children on the death of Mrs. Parker. Moreover, they are rights substantially different in kind to any rights "the children previously enjoyed."

I should add that I do not think any different result would have been reached had the deed of declaration of trust been an English settlement in similar terms.

The Lord Justice-Clerk referred to the decision of the Court of Appeal in England in the case of *In re Parkes' Settlement.*[8] I agree with him that the facts of that case were similar to the case now before your Lordships: indeed, we could not allow this appeal without disapproving the decision on one point in *In re Parkes' Settlement.*[8]

The facts of that case are set out in the headnote: "By a "settlement made in 1929 a settlor, who died in 1952, directed "his trustees to stand possessed of the settled property on trust "during his lifetime to pay the income of the trust fund equally "to his two daughters so long as they both remained alive and "unmarried, but so that the amount paid to each daughter was "not to exceed £250 in any year, or if one of them died or "married, the income payable to the other should not exceed "£410 in any year. Subject to this trust the income of the "surplus of the fund was to be paid equally between the surviving "children of the settlor. After the death of the settlor the "trustees were directed to appropriate, in respect of such of the "daughters as should then be unmarried, a fund sufficient at that "time to produce an annuity of £250 each year for her life, to be "paid so long as she continued unmarried. The trustees were "empowered to resort to the capital of the appropriated fund to "make good any deficiency of the annual income of that fund. "Subject to those trusts, the capital and income of the trust "fund, including any surplus income of the appropriated fund, "was to be held on trust for such of the settlor's children as "should survive him and if more than one in equal shares "absolutely. All the four children of the settlor survived him "and both the daughters had remained unmarried. The Crown "claimed estate duty under section 2 (1) (*d*) of the Finance Act, "1894, first in respect of the annuities which became payable "to the daughters out of the appropriated funds on the death and, "secondly, in respect of the corpus of the settled property to "which the four children of the settlor became absolutely entitled "at his death."

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[8] [1956] 1 W.L.R. 397.

Only the decision on the second claim is relevant to the point now before your Lordships. The Court of Appeal decided it in favour of the Crown. Jenkins L.J. said[9]: "Before the death "of the settlor, each child had a future interest in the capital "of the fund contingent on him or her surviving the settlor "and uncertain as regards its amount, which depended on "the number of children who might survive him. After the "death of the settlor, each child had an absolutely vested interest "in one-fourth of the capital of the trust fund, and the future "income thereon. I find it impossible consistently with the ratio "decidendi in *Adamson's* case,[10] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[11] to "hold that such vested interest in capital was not a beneficial "interest accruing or arising on the death of the deceased within "the meaning of section 2 (1) (*d*). It is further, to my mind, "quite plain that, in arriving at the extent or value of such "beneficial interest, no deduction can be made in respect of the "four children's interest pur autre vie in the surplus income "during the life of the settlor, for these interests came to an end "on his death. Any deduction in respect of their interests in "expectancy is, of course, precluded by section 28 of the Finance "Act, 1934." Those observations are directly in point in the present case and I respectfully agree with them.

Appellants' counsel said that a deed having exactly the same substantive effect as the deed of declaration of trust could have been so framed as unquestionably to reduce the liability of duty to the extent to which he contended. That may be so. He went on to say that liability to estate duty ought not to depend on the mere words of the trust disposition. But in practice it must. I respectfully agree with the observations of Lord Reid in the case of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*,[12] where he said: "It may seem unduly technical that liability for "estate duty should depend on the form of the settlement and "not on the fact that a financial benefit emerges on the death, "but that seems to me to be inevitable once it is found, as it was "in *D'Avigdor-Goldsmid's* case,[13] that 'beneficial interest' in "section 2 (1) (*d*) means a legal right and not a financial benefit."

For these reasons I would dismiss the appeal.

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[9] [1956] 1 W.L.R. 397, 412.

[10] [1933] A.C. 257.

[11] [1953] A.C. 347.

[12] [1958] A.C. 210, 230 (H.L.); [1957] 3 W.L.R. 427; [1957] 2 All E.R. 745.

[13] [1953] A.C. 347.

LORD KEITH OF AVONHOLM. My Lords, this case raises a short point which turns on the effect, for estate duty purposes, of a clause in a trust deed on property deemed to have passed under section 2 (1) (*d*) of the Finance Act, 1894. [His Lordship stated the facts and continued:] The contentions of the appellants are that each of the truster's children had a single continuing interest in the trust fund, and that the only effect of her death upon that interest was to enlarge it by removing the risk of the beneficiary predeceasing her. Accordingly, the value of the beneficial interest should be assessed, the argument runs, by calculating the amount, if any, by which the value of the beneficiary's interest immediately after the truster's death exceeded the value of that interest before her death. This should be calculated, it is said, either (1) by taking into account the fact that immediately before her death the truster was in articulo mortis, so that the risk of a beneficiary's predecease was negligible and his interest at that time almost equal to the capital value of his share; or (2) by measuring the difference in value actuarially by reference to their respective ages and the age of the truster and their eventual interests.

I find it unnecessary to consider these consequential contentions, for I find myself, in limine, in agreement with their Lordships of the Second Division that the relevant clause of the trust deed conferred no single continuing interest in the trust fund which was merely enlarged on the death of the truster. The argument for the appellants was put in its most attractive form by saying that during the life of the truster the children had an interest in possession in the enjoyment of the income of the trust fund and that on the truster's death, in the events that have happened, they continue to enjoy that income. But granted they enjoy the same income, the income before and after the death is derived from quite different rights. Before the truster's death there was merely a right in the children to call the trustees to account for their administration of the trust and to pay to them the income arising: *Inland Revenue* v. *Clark's Trustees.*[14] After the death their income derived from ownership of the corpus of the trust estate vested in them for the first time on the death of the truster. These are radically different rights. It is not possible to say that there were single continuing interests in possession enjoyed before and after the truster's death. The trust came to an end with the truster's death and the right to receive the income of the trust fund ceased with it. I am merely repeating the reasons which commended themselves to their Lordships of the Second Division and to which I cannot usefully contribute anything further. A similar question came up in *In re Parkes' Settlement*[15] upon a settlement in English form, the terms of which I do not find it necessary to repeat. I cite it only for the observation of Lord Evershed M.R., where he said[16]: "But whatever the 'substance' of the children's interests might "be in the sense in which Mr. Pennycuick used that term, it is to "my mind incontrovertible that the legal effect of the settlement "was to confer or give rise for the first time on the death of the "settlor to an absolute interest in capital in favour of each of "the settlor's four children, contingently upon their surviving the "event of the settlor's death. Those interests were, to my mind, "distinct and different in kind and quality from the rights of the "four children to share in surplus income during the life of the "settlor." This passage, in my opinion, precisely covers this case.

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[14] 1939 S.C. 11.

I would dismiss the appeal.

LORD JENKINS. My Lords, I agree

By a deed of declaration of trust made in the month of April, 1938, a trust fund provided by the late Mrs. Eliza Balfour Coats or Parker (hereinafter called "the deceased") was settled upon trusts whereunder, during the lifetime of the deceased, the income of the trust fund was to be paid to her three children in equal shares, with a gift over in the event of any child dying in the lifetime of the deceased to the issue of the child so dying, or in default of such issue by way of accruer to the surviving children equally between them; and on the death of the deceased the trust fund was to be divided into three equal parts, and one part was to be paid over to each of the said children as their absolute property, with provisions to the effect that in the event of any child dying in the lifetime of the deceased leaving issue, such issue were to take equally among them per stirpes the share of capital which their parent would have taken on survivance, and that in the event of any of the said children dying in the lifetime of the deceased without leaving issue, the share of capital which the child so dying would have taken was to be divided equally among the survivors and the issue per stirpes of any of the said children who might have died before the deceased leaving issue. The deed also contained an express provision to the effect that no interest in the trust fund should vest in any of the beneficiaries thereunder until the death of the deceased.

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[15] [1956] 1 W.L.R. 397.

[16] Ibid. 401.

The deceased died on February 16, 1956, survived by her three children, all of whom had attained majority; and the trust fund thereupon became immediately divisible in equal shares among the three children as their absolute property.

In these circumstances, the Commissioners of Inland Revenue assessed the entire trust fund to duty on the death of the deceased under section 2 (1) (*d*) of the Finance Act, 1894, on the footing that the trust fund was within the meaning of that provision an "interest . . . provided by the deceased," and was, accordingly, to be deemed to pass on the death of the deceased "the extent "of the beneficial interest accruing or arising . . . on the death "of the deceased"; that a beneficial interest did so accrue or arise to each of the three children, in the shape of the absolute interest in one-third of the capital of the trust fund to which he or she then became absolutely entitled in possession; and that the beneficial interest so accruing or arising to the three children collectively extended to the whole of such capital.

From this assessment the trustees of the deed of trust appealed to the Court of Session under the provisions of sections 10 and 23 (1) of the Finance Act, 1894. Their appeal was refused by an interlocutor of the Second Division of the Court of Session dated July 9, 1958, and from that interlocutor the trustees, pursuant to leave granted by the Second Division of the Court of Session, now appeal to your Lordships' House.

In view of the decision in *Adamson* v. *Attorney-General*,[17] Mr. Pennycuick, in his argument for the trustees, did not dispute that the trust fund was an "interest . . . provided by the "deceased" within the meaning of section 2 (1) (*d*); or that any beneficial interests in the trust fund which could be shown to have accrued or arisen to the three children on the death of the deceased attracted estate duty under that provision, according to their extent when properly ascertained; or that *some* beneficial interests did so accrue or arise. His sole complaint was to the effect that the beneficial interests which did admittedly so accrue or arise did not when properly ascertained extend to the entire capital of the trust fund, because allowance ought to be made for the beneficial interests in possession in the income of the trust fund to which (according to his argument) the three children were entitled before, and continued to be entitled after, the death of the deceased under the provisions of the deed of trust.

[17] [1933] A.C. 257.

Before proceeding to examine this argument, I should refer to section 28 of the Finance Act, 1934, which was passed to counteract the effect of the decision in *Adamson's* case.[17] Under that section, the extent of any beneficial interest accruing or arising on the death of the deceased in cases falling within section 2 (1) (*d*) "shall be ascertained, and shall be deemed always to "have been ascertainable, without regard to any interest in "expectancy the beneficiary may have had therein before the "death."

It follows that the extent of the beneficial interests here in question must be ascertained without regard to the value of the interest in expectancy in one-third of the capital of the trust fund to which each child was entitled immediately before the death of the deceased contingently on surviving her.

Accepting this, as he must, Mr. Pennycuick seeks to reduce the extent of the beneficial interests accruing or arising on the death of the deceased by reference to pre-existing interests in possession as distinct from pre-existing interests in expectancy, and he puts his case in this way. He says that from the date of the deed of trust each child became in any event entitled in possession to a life interest in one-third of the income of the trust fund; and that the death of the deceased only affected the position in that it removed the risk to which each child was subject of losing his or her interest in the trust fund through dying in the lifetime of the deceased, and enlarged each child's life interest into an absolute interest. He submits accordingly that the beneficial interest accruing or arising to each child on the death of the deceased must be limited to the difference between the value at the death of the deceased of one-third of the capital of the trust fund and the value at the same date of an interest for the life of that child in a like share of such capital. The life interest, he says, cannot be treated as part of the beneficial interest accruing or arising on the death of the deceased, because the child already had it before the death of the deceased.

I cannot accept this argument, which appears to me to do violence to the provisions of the deed of trust as they actually stand. It is plain that under those provisions the income trusts are confined to the period from the date of the deed down to the date of the death of the deceased. During that period if he or she so long lives each child is entitled to one-third of the income, or it may be more in the event of accruer by reason of the death of one or both of the others without issue. On the death of the deceased, the income trusts come to an end and there arise new and distinct trusts of a different character for the payment to each child if then living of one-third of the capital of the trust fund as his or her absolute property, with the provisions already described for the substitution of the issue of any child dying in the lifetime of the deceased, and for the accruer to the other children or their issue of the share of any child dying in the lifetime of the deceased without leaving issue. During the lifetime of the deceased these trusts of capital conferred no more than contingent future interests and the persons to become actually entitled under them were not, and could not be, ascertained until the death of the deceased. In the event which happened of all three children surviving the deceased the trust of capital which actually took effect was the primary trust to divide it among them in equal shares as their absolute property, and this trust took effect in their favour on the death of the deceased by reason of the fact that they survived the deceased. It appears to me that the designation of a "beneficial interest accruing or arising on the "death of the deceased" is wholly apt to describe the entire interest in capital taken by each child on the death of the deceased under this trust, and that in ascertaining the extent of such beneficial interest there is no ground for making any deduction in respect of the very different interest previously enjoyed by the child under the trusts of income which the death of the deceased had brought to an end. I cannot reconcile with the terms of the deed Mr. Pennycuick's submission to the effect that each child took from the outset a life interest in one-third of the income of the fund continuing after the death of the deceased. This prolongation of a child's life interest, as I understand the argument, depends on the theory that each child on receiving his or her share of capital became an absolute owner of such share, entitled to whatever income it might produce, and thus remained life tenant of the share, albeit also entitled if so minded to dispose of the capital. I find it impossible to accept this novel doctrine; and even if (contrary to my view) the theory that each child is to be considered as a life tenant of the absolute interest in capital taken by him or her on the death of the deceased is tenable at all, I fail to see any justification for tacking this constructive life interest, depending as it did on the child surviving the deceased and so becoming absolutely entitled to one-third of the capital, on to the interest in income which ceased on the death of the deceased, so as to piece together one continuous life interest in one-third of the income beginning at the date of the deed and persisting after the death of the deceased. Moreover, quoad the period of prolongation this so-called life tenancy would itself be a product of the receipt by the child of his or her share of capital, or, in other words, an incident of the beneficial interest accruing or arising to the child on the death of the deceased in the shape of the right to enjoy the income produced by his or her share of capital when paid over. I do not see how this incident of the beneficial interest accruing or arising can constitute a proper deduction from the value of that interest for the purposes of section 2 (1) (*d*). Indeed, it would form part of the interest in expectancy which the child had in the share of capital before the death and accordingly could not be deducted consistently with section 28 of the Finance Act, 1894.

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[17] [1933] A.C. 257.

In the course of the argument your Lordships were referred to a number of cases, including *Adamson* v. *Attorney-General* [17] and *Attorney-General* v. *Lloyds Bank Ltd.*[18] These cases, so far as they decided that regard should be had to expectant interests in measuring, for the purposes of section 2 (1) (*d*) of the Act of 1894, the extent of the benefit accruing or arising, have been displaced by section 28 of the Finance Act, 1934, but this passage in the speech of Lord Buckmaster in *Adamson* v. *Attorney-General* [19] has some bearing on the present case. Lord Buckmaster there said, in holding that section 2 (1) (*d*) applied: "The interest here provided by the deceased was materially "changed at his death from being an interest liable to be divested "and contingent into an interest absolute and undefeatable, and "that new interest arose on the death of the deceased." The following passage to the like effect occurs in the speech of Lord Warrington of Clyffe, where Lord Warrington, after rejecting the claim to duty on the ground of an actual passing under section 1, continued as follows [20]: "But this does not conclude the matter. "It is still necessary to consider the alternative claim of the "Crown under s. 2, subs. (1) (*d*). This section, unlike s. 1, "which deals only with property as a whole, brings within the "ambit of the charge individual interests provided by the "deceased to the extent of the beneficial interest accruing or "arising on the death of the deceased. In the present case "the interest of each child was unquestionably provided by the "deceased, and is therefore to be deemed to be included in the

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[17] [1933] A.C. 257.
[18] [1935] A.C. 382.
[19] [1933] A.C. 257, 268.
[20] Ibid. 277.

"expression 'property passing on the death of the deceased,' but "only to the extent of the beneficial interest accruing or arising "on the death of the deceased. Before his death each child had "a beneficial interest, but one that might be destroyed either by "an exercise of the power of appointment or by the death of the "child in the lifetime of the deceased; on his death without "exercising his power the beneficial interest of each child became "absolute and indefeasible. The value of this beneficial interest, "of course, exceeded the value if any of that interest to which "the child was entitled previously to the death of the deceased, "and to the extent of that excess such beneficial interest is, in "my opinion, to be deemed to be property passing on the death "and would under section 1 be charged with duty accordingly." So far as this passage limits the beneficial interest accruing or arising on the death to the excess in value of that beneficial interest over the interest (sc. the interest in expectancy) to which the child was entitled previously to the death of the deceased, it has, as already mentioned, been overruled by section 28 of the Finance Act, 1934, but it still affords authoritative guidance as to the character of the changes of beneficial interest on a death to which section 2 (1) (*d*) is directed.

On the other hand, in the case of *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [21] it was sought to charge with duty under section 2 (1) (*d*) as a beneficial interest accruing or arising on the death of the deceased the proceeds of a policy of insurance on the life of the deceased to which a son of the deceased had become absolutely entitled in the deceased's lifetime, and it was held in your Lordships' House (reversing the decision of the Court of Appeal) that this claim was ill-founded, inasmuch as the death of the deceased merely enhanced the value of an asset (namely, the contract of assurance) of which the son was already the absolute owner, and accordingly no beneficial interest which the son had not previously possessed accrued or arose to the son on the death of the deceased. The ratio decidendi of this case sufficiently appears from the speech of Lord Porter [22] and that of Lord Reid.[23] Lord Porter said [24]: "From the date of the assignment to him in 1934 the appellant "was the absolute owner of the policy and, subject to payment "of the premium, entitled to receive the sum insured, with any "bonus, when the stipulated time of payment, viz., the death,

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[21] [1953] A.C. 347.
[22] Ibid. 364, 365.
[23] Ibid. 375.
[24] Ibid. 364.

"had been reached. He did not get a new interest; he obtained "the fruition of the interest which he already held. As one of "your Lordships expressed it in the course of argument, the "value of the chose in action is increased, the interest of the "beneficiary is not altered." Later Lord Porter said [25]: "In "*Adamson's* case [26] there was, as the majority of their Lordships "held, a change in the interest of the beneficiaries: before the "death they had a contingent interest which might have been "divested; after it they had a vested interest. The reasoning is "best seen in the observations of Lord Warrington." Then, after citing the passage from the speech of Lord Warrington to which I have already referred, Lord Porter continued [27]: "On that "reasoning there was as a result of the death a change in the "rights which each child enjoyed. Until it occurred he might "have got all or nothing or some intermediate sum: afterwards "his rights were finally determined. The case differs from the "present one in which the rights of the appellant have not "changed. He is and has been since 1934 full and absolute "owner of the policy. All that has happened is that, though its "value is greater, his interest is the same. It follows that in my "view this alternative argument, like that previously presented, "should not succeed." Lord Reid said [28]: "In the cases where "the Crown has succeeded it has been because it was held that "some right or property of a different kind from that previously "enjoyed by the beneficiary arose or accrued on the death, or the "right of the beneficiary was in some way enlarged or altered and "not merely because the beneficiary's existing right became more "valuable after the death."

In the two cases of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners* and *Wrightson* v. *Inland Revenue Commissioners*,[29] which concerned insurance policies comprised in settlements, a majority of your Lordships' House reached the same conclusion as in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [30] by a similar process of reasoning.

I would finally refer to the case in the Court of Appeal of *In re Parkes' Settlement*.[31] In that case a settlor who died in 1952 had by a settlement made in 1929 settled a fund upon trust during his lifetime to pay the income of the fund to his two daughters in equal shares so long as they remained alive and unmarried, but not exceeding £250 to each of them in any one year. Subject to this trust the income was to be paid equally between the surviving children of the settlor. After the death of the settlor, the trustees were directed to appropriate in respect of each daughter then unmarried a fund sufficient to produce an annuity of £250 per annum for her life with power to resort to capital. Subject to those trusts the capital and income of the fund, including any surplus income of the appropriated fund, was to be held in trust for such of the settlor's children as should survive him and if more than one in equal shares. All four children of the settlor survived him and both the daughters remained unmarried. Estate duty was claimed under section 2 (1) (*d*) first in respect of the annuities which became payable out of the appropriated funds on the death, and secondly in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death. It was held by the Court of Appeal that the first of these claims failed, on the ground that the effect of the trusts of income during the settlor's life was to entitle each daughter so long as she remained alive and unmarried to an annual payment of £250 out of the income of the entire fund, while the effect of the trusts which came into operation on the settlor's death was to entitle each daughter so long as she continued unmarried to an annual payment of £250 out of the income, or if need be out of the capital, of the appropriated fund. In the result, therefore, each daughter became entitled from the date of the settlement to an annuity of £250 during her life and spinsterhood whether the settlor was alive or dead, the only difference being that before the death of the settlor each daughter's annuity was payable out of the income of the entire fund, whereas after his death it was payable out of the income, and if need be out of the capital, of the fund appropriated to meet it. This change in the mode of payment of, and security for, the annuity did not appear to the Court of Appeal to involve any such change in the character of the daughter's beneficial interest on the death of the settlor as was required on the *D'Avigdor-Goldsmid*[32] principle in order to make the annuity payable to her after his death a beneficial interest accruing or arising on his death within the meaning of section 2 (1) (*d*), as opposed to a mere continuation of the annuity to which she had been entitled ever since the date of the settlement.

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[25] [1953] A.C. 347, 365.

[26] [1933] A.C. 257.

[27] [1953] A.C. 347, 365.

[28] Ibid. 375.

[29] [1958] A.C. 210 (H.L.); [1957] 3 W.L.R. 427; [1957] 2 All E.R. 745.

[30] [1953] A.C. 347.

[31] [1956] 1 W.L.R. 397.

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[32] [1953] A.C. 347.

As I have already indicated, it is to my mind clear that no such continuing interests were created by the deed of trust in the present case.

The second claim in *In re Parkes' Settlement*,[33] namely, the claim to duty on the corpus of the settled property, was upheld in the Court of Appeal. In my own judgment[34] I summarised my reasons for that view in terms which are to my mind so closely applicable to the present case that I venture to repeat them here: "As regards the interest of each of the four children in the "capital of the trust fund, I think the judge was clearly right "in holding, as he did, that section 2 (1) (*d*) applied. Before "the death of the settlor, each child had a future interest in the "capital of the fund contingent on him or her surviving the "settlor and uncertain as regards its amount, which depended "on the number of children who might survive him. After the "death of the settlor, each child had an absolutely vested interest "in one-fourth of the capital of the trust fund, and the future "income thereon. I find it impossible consistently with the ratio "decidendi in *Adamson's* case,[35] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[36] to "hold that such vested interest in capital was not a beneficial "interest accruing or arising on the death of the deceased within "the meaning of section 2 (1) (*d*). It is further, to my mind, "quite plain that, in arriving at the extent or value of such "beneficial interest, no deduction can be made in respect of the "four children's interests pur autre vie in the surplus income "during the life of the settlor, for these interests came to an end "on his death. Any deduction in respect of their interests in "expectancy is, of course, precluded by section 28 of the Finance "Act, 1934."

For the reasons I have endeavoured to state, which are substantially in accord with those upon which their Lordships of the Second Division of the Court of Session proceeded, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Baddeleys & Co. for Hunter, Harvey, Webster & Will, W.S., Edinburgh; Moncrieff, Warner, Paterson & Co., Glasgow; Solicitor of Inland Revenue.*

F. C.

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[33] [1956] 1 W.L.R. 397.
[34] Ibid. 412.
[35] [1933] A.C. 257.
[36] [1953] A.C. 347.

[HOUSE OF LORDS.]

HAMILTON . . . . APPELLANT; H. L. (Sc.)*

AND

NATIONAL COAL BOARD . . . . RESPONDENTS.

1959
Nov. 25, 26;
Dec. 15.

Mines and Minerals—Machinery and equipment—Breach of statutory duty—" Shall be properly maintained "—Whether duty absolute—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 22 (1), 25 (1), 152—*Mines and Quarries Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 70), *s.* 81 (1).
Words and Phrases—" Properly maintained "—" Maintained."
Statute—Construction—Similar acts—Similar construction of words—Definition section in one Act only—Meaning of " maintained "—Factories Act, 1937, *ss.* 22 (1), 25 (1), 152—*Mines and Quarries Act,* 1954, *s.* 81 (1).

By section 81 (1) of the Mines and Quarries Act, 1954: " All " parts and working gear, whether fixed or movable, including the " anchoring and fixing appliances, of all machinery and apparatus " used as, or forming, part of the equipment of a mine . . . shall be " properly maintained."

A miner sought damages for injury suffered in the course of his employment, alleging that his employers were in breach of the duty imposed by section 81 (1) of the Act. He averred that his hand had been injured through the absence of stells to anchor a hand-operated winch which had tipped forward and pinned it against a roof girder. He contended that the absence of stells, for whatever reason, constituted a breach of the statutory duty to maintain the winch properly, even though it was unexplained:—

Held, that the words " properly maintained " imposed on the mine owners an absolute and continuing obligation to keep the winch in a proper and efficient state, and did not merely impose on them the duty of properly servicing it (post, pp. 641, 645, 651, 657).

Per Lord Keith. If the apparatus collapsed suddenly from a latent defect which had not disclosed itself before the accident it might be said that it was being properly maintained (post, p. 651).

Smith v. *Cammell, Laird & Co. Ltd.* [1940] A.C. 242 (H.L.); 56 T.L.R. 164; [1939] 4 All E.R. 381; *Galashiels Gas Co. Ltd.* v. *Millar* [1949] A.C. 275 (H.L.); 65 T.L.R. 76; [1949] 1 All E.R. 319; *Latimer* v. *A. E. C. Ltd.* [1953] A.C. 643 (H.L.); [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449 considered.

Decision of the Second Division of the Court of Session, 1959 S.C. 30 reversed.

APPEAL from the Second Division of the Court of Session.

The appellant, John Hamilton, claimed damages from the respondents, the National Coal Board, for injuries received by him in an accident which occurred in Whiterigg Colliery, West Lothian, on August 19, 1957. His occupation was that of a "ropeman" or "rope splicer," and it was part of his duties to tighten the haulage rope of the main haulage system in the colliery. The haulage was an endless rope haulage operated by an engine closer to the pit bottom end of the haulage. At the end of the haulage further from the pit bottom the haulage ran round a return wheel fitted to a bogie on the haulage rails. In order to tension the haulage, a hand-operated winch was provided by the respondents. This winch, as described by the appellant in his pleadings, consisted of a horizontal drum which was "set in "an open framework of steel which is ultimately bolted on to two "large steel beams of 'H' cross-section which rest on the "pavement lying along the line of the road. The top of the "framework is about five feet from the ground and the top of it "is about one foot from the roof." The appellant further averred that at the time of the accident the winch was held in position against the weight of the haulage only by a single steel beam fitted across the road against the legs of the roof girders, the top of it, as he claimed, being about 18 inches above ground. It was also said that at the time of the accident the haulage rope led to the upper side of the drum. The averment of fact which formed the basis of the appellant's sole allegation of fault on the part of the respondents was in the following terms: "At the "time of the accident there were no stells set in position between "the back end of the under-pinned beams and the roof." The appellant's averments were further to the effect that, while he was tightening the rope by using the winch, he placed his left hand on top of the raised part of the framework and that, on the haulage being started, the whole framework tipped forward, pinning his hand between the framework and a roof girder. He averred that the accident was caused by the respondents' failure to comply with a particular part of the provisions of section 81 (1) of the Mines and Quarries Act, 1954.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

The appellant appealed against an interlocutor of the Second Division of the Court of Session dated November 27, 1958, in which their Lordships by a majority (Lord Patrick and Lord Mackintosh, Lord Justice-Clerk Thomson dissenting) dismissed his case as irrelevant and, in so doing, upheld the interlocutor dated July 31, 1958, of Sheriff-Substitute W. Garrett, Sheriff-Substitute of the Lothians and Peebles. The question arising in this appeal primarily involved the appropriate meaning and sound construction to be given to the words " shall be properly maintained " as contained in section 81 (1) of the Act.

Manuel Kissen Q.C. and *A. M. G. Russell* (both of the Scottish Bar) for the appellant. The respondents did not properly maintain the winch in accordance with their statutory duty. The fact that the absence of the stells is not explained does not matter. Since they were not there the respondents had not fulfilled their statutory obligation. The words " shall be properly maintained " in section 81 (1) of the Act of 1954 impose a continuous obligation to ensure that the equipment at all times conforms to the standards laid down in that subsection, that is, an employer must ensure that it is at all times in proper and efficient working order. It would be strange if words taken out of section 22 (1) and section 25 (1) of the Factories Act, 1937, and put into the Act of 1954 were intended in the latter Act to have a restricted meaning so that the duty imposed was much less than under the former Act and was no more than the common law duty. Section 81 of the Act of 1954 is not confined to machinery; it also applies to all foundations on which the machinery is fixed. The initial duty is to provide machinery of good construction and then to maintain it, that is, to keep it up as it was in the beginning. The obligation amounts to a warranty that the equipment will be maintained in that condition. There is an absolute duty. The phrase " properly maintained " means more than testing, adjustment, inspection, attending to or servicing; it means that the equipment must be kept in a state of good repair and in safe condition. The dominant purpose of the Act is to protect the workman, and that protection should not be diminished by implication: *John Summers & Sons Ltd.* v. *Frost.*[1]

Looking at the whole section, including subsection (2), makes the meaning clear. To maintain means to keep always in the same condition with due regard to safety. See section 23 (1) (the words " provided and maintained "), section 28 (3) (" properly " maintained "), section 29 (" provision and maintenance "), section 31 (2) (" properly maintained "), section 34 (1) (" made and " maintained "), section 41 (1) (" made, maintained and used "), section 45 (1) (" made and maintained "), section 46 (" provided " and maintained "), section 49 (1) (" provided and maintained "); see also sections 55, 58, 60, 61, 68, 72 and 82. In *Galashiels Gas*

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[1] [1955] A.C. 740, 751 (H.L.); [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

Co. Ltd. v. *Millar*[2] there was no suggestion that " maintained " was the equivalent of servicing. See also *Latimer* v. *A. E. C. Ltd.*[3]; *Gledhill* v. *Liverpool Abattoir Utilities Co. Ltd.*[4]; *Smith* v. *Cammell, Laird & Co. Ltd.*[5] and *Woods* v. *W. H. Rhodes & Son Ltd.*[6] Section 157 of the Act of 1954 protects persons in respect of contraventions which it was impracticable to avoid. While the duties imposed by the Act appear to be stringent, this section always provides an escape on a reasonable defence. As to patent defects, see *M'Neill* v. *Dickson & Mann Ltd.*[7]

J. O. M. Hunter Q.C. (of the English Bar, Q.C. of the Scottish Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondents. The appellant confined himself to a limited statutory case, alleging breach of duty by the respondents in that the working gear had not, it was alleged, been properly maintained. In the words of the Sheriff-Substitute: " Both parties argued the " question on the basis that there was a defect in maintenance " and not a defect in construction, and the pursuer's solicitor " conceded that unless the section imposed an absolute and " continuous obligation to have stells set in position he had not " made a relevant case that the apparatus was not properly " maintained."

As to the defence under section 157 of the Act of 1954, where the onus is on the defence, it might be very hard " to prove that " it was impracticable to avoid or prevent the contravention."

The argument for the appellant would drive section 81 (1) to extreme lengths and, if successful, would result in a defender being liable in such a case both civilly and criminally.

The appellant contended for a warranty of safe operation at all times. On that argument a developing latent defect would still involve the respondent in liability. But the natural meaning of the words " properly maintained " in section 81 (1) is " serviced " or " looked after " or " attended to " in a proper way. " Maintenance " suggests oiling, greasing and stripping down. It bears the meaning which a practical engineer would give it. The respondents adopt what was said by Lord Patrick in the

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[2] 1948 S.C. 191, 212; [1949] A.C. 275 (H.L.); 65 T.L.R. 76; [1949] 1 All E.R. 319.

[3] [1953] A.C. 643, 660 (H.L.); [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[4] [1957] 1 W.L.R. 1028, 1034 (C.A.); [1957] 3 All E.R. 117.

[5] [1940] A.C. 242, 255, 258, 263 (H.L.); 56 T.L.R. 164; [1939] 4 All E.R. 381.

[6] [1953] 1 W.L.R. 1072, 1078–1079 (C.A.); [1953] 2 All E.R. 658.

[7] 1957 S.C. 345.

H. L. (Sc.)

1959

HAMILTON
v.
NATIONAL
COAL BOARD.

court below towards the end of his opinion,[8] and by Lord Mackintosh.[9] See also what was said by Lord MacDermott in *Galashiels Gas Co. Ltd.* v. *Millar.*[10] Subsection (2) (*a*) to section 81 gives a clue to the meaning of the word " maintained " in subsection (1); it is unlikely that the meaning would be different when the two are so close together. But otherwise there is no presumption that a word is used in the same sense throughout an Act of Parliament. The provisions of the Act and the respondents' case fall into a pattern. In the category of cases where the word " maintain " is used without the word " properly " the result to be achieved is what is looked at, as in *Smith* v. *Cammell, Laird & Co. Ltd.*[11] When the legislature wishes to ensure a guarantee of safe maintaining, it is capable of saying so. In section 86 of the Act of 1954 it uses the words " shall be kept in safe condition," which is the way the appellant suggests reading the words in section 81 (1). The words " properly maintained " are used in sections 28 (3), 31 (2), 33 (2), 60 (3), 82 (2), 94 (2) and 151 (1). There their use suggests the natural meaning of taking active steps of servicing. In the regulation-making provisions, sections 29, 61 (2), 63 (*b*) and 68 (1) (*b*), the word " maintenance " must be judged from its context. In the following sections of the Act the words " maintained " and " maintenance " are used without the word " properly ": sections 23 (2), 34 (1) (*a*), 41 (1), 45 (1), 46, 49 (1), 55, 58 (1), 70 (1) (*a*), 72, 84 (1), 87 (1), 96, 97 and 110 (2). The use of the word " properly " in section 81 (1) is incompatible with the contention that the word " maintained " imposes a duty to perpetuate continuously a particular original condition; such a duty would have to be expressed by the words " shall be so maintained." Support for the respondents' contentions is derived from regulations 17 (1), 19 (2), 23 (1) and (2) and 24 (1) and (2) of the Coal and Other Mines (Locomotives) Order, 1956 (S.I. 1956, No. 1771). The words " properly maintain " suggest a concern with the operation of maintenance rather than its result.

The Act of 1954 contains no definition of the word " maintained," unlike the Factories Act, 1937, which does contain such a definition in section 152 (1) (" maintained in an efficient state, in efficient working order and in good repair "). All the cases under the Act of 1937 were coloured by this definition. It influenced the decision in *Galashiels Gas Co. Ltd.* v. *Millar.*[12] In *Latimer* v. *A. E. C. Ltd.*[13] it was recognised that that definition attached a specialised meaning to the word in the Act of 1937. In that case there is some difficulty in adopting Lord Asquith's approach; his view stands alone and is not essential to the ratio decidendi. But for the definition the natural meaning of maintenance might well have been adopted. See also *Woods* v. *W. H. Rhodes & Son Ltd.*,[14] *Gledhill* v. *Liverpool Abattoir Utilities Co. Ltd.*[15] and *Smith* v. *Cammell, Laird & Co. Ltd.*[16]

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[8] 1959 S.L.T. 255, 261.

[9] Ibid. 262.

[10] [1949] A.C. 275, 286–287.

[11] [1940] A.C. 242.

Manuel Kissen Q.C. replied.

Their Lordships took time for consideration.

Dec. 15. VISCOUNT SIMONDS. My Lords, section 81 (1) of the Mines and Quarries Act, 1954, enacts that " All parts and " working gear, whether fixed or movable, including the anchoring " and fixing appliances, of all machinery and apparatus used as, " or forming, part of the equipment of a mine, . . . shall be of " good construction, suitable material, adequate strength and free " from patent defect, and shall be properly maintained." The only question on this appeal—and it is an important one—is what is the meaning of these last five words.

The appellant, a miner in the employment of the respondents at Whiterigg Colliery, West Lothian, in August, 1957, suffered an injury in the course of his employment. It was his duty to tighten a main haulage rope at the mine whenever it became slack. For that purpose there was provided by the respondents a hand-operated winch contained in a metal frame which rested on the ground but was not bolted to it. The appellant averred that as he was winding the winch he placed his hand on the frame to steady it, and that the whole winch suddenly tipped forward, pinning his left hand between the raised back portion of the framework and a roof girder. This, he averred, was due to the fact that there were no stells in position to steady the winch. Thus the respondents failed to maintain properly the winch, which was part of their statutory duty. It mattered not that the absence of stells was unexplained: it might have been due to the act of a third party or to the development of a latent defect. Nevertheless, the respondents were in breach. If the stells were not there, the statutory obligation properly to maintain the winch had not been observed. This is what is sometimes called an absolute obligation.

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[12] [1949] A.C. 275, 281–282, 283, 284–285.

[13] [1953] A.C. 643, 650, 653–654, 657, 658.

[14] [1953] 1 W.L.R. 1072, 1079–1080.

[15] [1957] 1 W.L.R. 1028, 1034–1035.

[16] [1940] A.C. 242, 248–249, 258–259, 266.

My Lords, this view of the statutory obligation did not commend itself to the learned Sheriff-Substitute of the Lothians and Peebles nor to the majority of the Second Division of the Court of Session. The appellant's claim was dismissed; it was held that he had not made a relevant case that the equipment was not " properly maintained." It is clear that all turns on the meaning in their context of those two words.

My Lords, it is impossible to approach this case uninfluenced by previous decisions upon this and other Acts, and I find more assistance in the construction which has been put upon that simple word " maintain " in the context of machinery and works of all kinds, whether under the Factories Acts or the Mines Act or regulations made thereunder, than I do in the words which have been supposed to qualify or define that word. Therefore I go first to a case in this House, *Smith* v. *Cammell, Laird & Co. Ltd.*[1] There the question was as to the meaning of the word " maintain " in regulation 31 of the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901. There was nothing in the context to expand or limit it except a statement of the object to which I refer later. It was held to impose an absolute obligation. I need cite only the words of Lord Russell of Killowen[2]: " The duty being, as I think it is, effectively cast " upon the respondents, is it an absolute duty, or can they " excuse themselves by saying that by competent inspection at " regular and frequent intervals they have done everything " possible to discharge their duty? I think the duty is an " absolute one: the wording is too strong to justify the milder " view. The words ' All staging shall . . . be maintained ' point, " in my opinion, to an absolute and not a qualified obligation." The word " absolute " in this connection has become part of the dictionary of the law. Sometimes the word " continuing " is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order. It is, no doubt, a difficult conception, but the employer has his refuge in the escape section of the relevant Act, so far as it applies.

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[1] [1940] A.C. 242 (H.L.); 56 T.L.R. 164; [1939] 4 All E.R. 381.

[2] [1940] A.C. 242, 263.

I turn next to *Galashiels Gas Co. Ltd.* v. *Millar.*[3] For it is, I think, upon that case, or rather upon certain observations of the noble and learned Lords who took part in its decision, that the judgments in the Scottish courts have been largely founded and that the respondents now rely. In that case the question arose upon the Factories Act, 1937. The words "properly "maintain" are contained in section 22 (1) of the Act, but, in addition, in section 152 (a definition section) "maintained" is defined as meaning "maintained in an efficient state, in efficient "working order and in good repair." I have read with great care, and more than once, the speeches in the House in that case, and I think that it is fair to say that the determining factor with at least the majority of their Lordships was the presence of the definition clause. Lord MacDermott, for instance, with whose speech, if I may respectfully say so, I have great sympathy, pointed out that the word "maintain" may be used to indicate the continuance of a particular state or in reference to the acts done to continue or perpetuate that state, and he was guided to the former interpretation by the definition. But though this may be so, it is another thing to say that in the absence of the definition they would have come to a different conclusion. Could they have adopted the second meaning suggested by Lord MacDermott, the "servicing" meaning as it has been called, consistently with the decision in *Smith's* case[4]? I find great difficulty in thinking that they could. In *Smith's* case[4] there was no definition clause, and I see nothing to differentiate it from the present case, except that here we have not a statement of the object for which the plant is required to be maintained but have the qualifying adverb "properly." This word was said by Lord Patrick to be quite inapposite to the former meaning, that is, the continuance of a certain state, and by Lord Mackintosh to be more appropriate to the latter. I cannot give the same weight to the word. If "maintained" simpliciter can properly refer to the continued state of the thing required to be maintained, I see no reason why "properly maintained" cannot make the same reference. Can it be anything more than a negligible indication of the one meaning or the other? It would not, I think, be wise in this area of legislation to found on such refinements of language. It is difficult to suppose that the legislature, knowing from *Smith's* case[4] what meaning must be attributed to the word "maintain" alone, thought to give it a different meaning by adding the word "properly."

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[3] [1949] A.C. 275 (H.L.); 65 T.L.R. 76; [1949] 1 All E.R. 319.

[4] [1940] A.C. 242.

I need refer to no other case than *Latimer* v. *A. E. C. Ltd.*[5] In that case section 25 (1) of the Factories Act, 1937, was under review. There again the definition section played its part, and again had its influence upon the decision of some of those who took no part in it. But it was otherwise with the late Lord Asquith of Bishopstone, who expressed the view (which, coming from such a source, I do not easily reject) that the same result should be reached without the definition clause. I need say no more about this case than that it provides neither binding nor persuasive authority for distinguishing cases in which "properly" qualifies "maintain" from those where it does not, or cases where there is a definition clause from those where it is absent.

It is in deference to the careful examination of the whole Act by counsel that I make some observations upon it. It is undoubtedly the fact that the words "maintain" and "maintenance" are used on a great number of occasions in the Act and in the regulations made under it, sometimes with, sometimes without, qualification: sometimes followed by an expression of the object which is to be secured, sometimes without such a following. It is, no doubt, desirable that the same meaning should be given to the same word wherever it is used in a statute, though a long experience of statutes has left me with some scepticism upon that principle. So, too, it is reasonable that variations of language should be supposed to intend some difference of meaning. But I cannot find in the fact, that in one statute there is a definition clause and in another there is not, a sufficient reason for departing from a meaning that has already been given to the word that is defined unless the definition itself compels me to do so. Nor does the fact that the word "maintain" is followed, as in *Smith's* case,[6] by words indicating the object of maintaining, for example, to ensure the safety of the workman, make any difference. I should in any case assume in such a context that that was the object. I must conclude, therefore, by saying that, in my opinion, it would be right to follow the course laid out in *Smith's* case[6] and *Millar's* case,[7] and declare that the obligation under section 81 (1) of the Mines and Quarries Act, 1954, is absolute. I do not think that either of the conflicting principles of construction, the one resting on the penal consequences of failure to perform an obligation, the other on the basic purpose of the Act to protect the workman, can usefully be invoked.

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[5] [1953] A.C. 643 (H.L.); [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[6] [1940] A.C. 242.

[7] [1949] A.C. 275.

The appeal should be allowed with costs here and below.

My noble and learned friend, LORD RADCLIFFE, who is unable to be here, has asked me to say that he concurs in my opinion.

LORD COHEN. My Lords, the question before your Lordships turns on the meaning to be given to the concluding words, "properly maintained," in subsection (1) of section 81 of the Mines and Quarries Act, 1954. That subsection is in the following terms: "All parts and working gear, whether fixed or "movable, including the anchoring and fixing appliances, of all "machinery and apparatus used as, or forming, part of the equip-"ment of a mine, and all foundations in or to which any such "appliances are anchored or fixed shall be of good construction, "suitable material, adequate strength and free from patent "defect, and shall be properly maintained."

This appeal comes before your Lordships on relevancy, and it is not disputed that if the pursuer is right in contending that the words "properly maintained" impose on the defenders an absolute and continuing obligation to keep the winch (the article of equipment in question in this case) in a proper and efficient state, the pursuer had averred a relevant case of the defenders being in breach of their statutory duty. On the other hand, if, as the defenders argue, these words merely impose on the defenders the duty of properly servicing the winch, the pursuer would not have stated a relevant case.

There appears to be no reported decision on the meaning of the words "properly maintained" where used in the Mines and Quarries Act, 1954, but very similar provisions in the Factories Act, 1937, have been the subject of judicial decision in your Lordships' House. In applying these decisions to the case now before your Lordships it has to be borne in mind that the Factories Act in section 152 contains a definition of the word "maintained" in the following terms: "'maintained' means "maintained in an efficient state, in efficient working order, and "in good repair," and that this definition is not repeated in the Mines and Quarries Act, 1954.

The first of such cases to which I shall refer is *Galashiels Gas Co. Ltd.* v. *Millar*.[7] In that case the question arose under section 22 (1) of the Factories Act, 1937, which provides that every hoist or lift shall be of good mechanical construction, sound material and adequate strength and be properly maintained. It was held that section 22 (1) imposed an absolute and continuing obligation, and that the respondent was entitled to recover even though, as the Lord Ordinary found, all reasonable steps had been taken to provide a suitable lift and to maintain it properly.

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[7] [1949] A.C. 275.

The wording of section 22 (1) is very similar to that of section 81 (1) of the Act now under consideration, but all their Lordships referred to the definition and based their decision on the combined effect of section 22 (1) and the definition. The speech of Lord Morton of Henryton is, I think, open to the construction that he might have reached the same conclusion without the definition, but it cannot be said to contain a dictum in favour of the pursuer in the present case. Lord MacDermott pointed out the two possible meanings of " maintain " to which I have referred, and added[8]: " My Lords, had the legislature " thought fit not to define 'maintained' Mr. Guest's submission " on this aspect of the case would have encountered less difficulty. " But when the terms of the definition are regarded the meaning " for which he has contended [that " maintained " means " serviced or looked after or attended to] is, in my opinion, at " once displaced." Mr. Hunter invited us to read Lord MacDermott's speech as indicating that without the definition Lord MacDermott would have accepted Mr. Guest's argument. I do not think this inference is justified. The most that can be said is that Lord MacDermott's neutrality to the argument was more benevolent than that of Lord Morton of Henryton.

The next case to which I wish to refer is *Latimer* v. *A. E. C. Ltd.*,[9] where the question arose as to the extent of the employers' duty under section 25 of the Factories Act to see that the floors were " of sound construction and properly maintained." The decision was in favour of the employers on the ground that even though in view of the definition in section 152 the obligation must be regarded as absolute it did not apply, to use the language of Lord Porter,[10] " to a transient and exceptional condition." Two of their Lordships in the course of their judgments made some observations as to what the extent of the obligation under section 25 would have been in the absence of the definition. Lord Porter said[11]: " Section 25, were it not for the definition, would

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[8] [1949] A.C. 275, 287.
[9] [1953] A.C. 643.
[10] Ibid. 654.
[11] Ibid. 653.

"seem merely to provide for sound construction and a proper "state of repair." Lord Asquith of Bishopstone said of the words in section 25[12]: "If these words stood alone and there "were no definition of the word 'maintain' in the statute, for "myself I should be in little doubt as to their interpretation. I "should take them to mean that at the time of its construction or "installation the floor should possess the structural qualities "which a floor ought to possess . . . and that from that time on "the owner of the factory should keep up, prolong or perpetuate "that structural condition." My Lords, I find myself more in agreement with Lord Asquith than with Lord Porter, but before stating my conclusion I would refer to one other decision of this House—*Smith* v. *Cammell, Laird & Co. Ltd.*[13]

In that case the statutory provision in question was contained in the Shipbuilding Regulations, 1931, made under section 79 of the Factory and Workshop Act, 1901, the material provision being as follows: "All staging shall (i) be securely constructed of sound "and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed; (ii) be "inspected at regular and frequent intervals by a competent "person." The appellant had been injured as a result of a defect in the staging and their Lordships held that he was entitled to recover damages on the footing that the obligation imposed by the regulation was an absolute one. Neither the Act nor the regulations contained a definition of "maintained" corresponding to that in section 152 of the Factories Act, 1937, but the regulation did contain a particular direction "to ensure the safety of all "persons employed." Their Lordships do not, however, appear to have placed much reliance on those words in arriving at their conclusion that the duty was absolute. I would refer in particular to passages in the judgments of Lord Atkin, Lord Russell of Killowen and Lord Wright. Lord Atkin[14] asks the question whether the duty imposed by the regulation is absolute, and continues: "or is it to be construed as limited to a duty to take "reasonable care to maintain? . . . I can see no reason "for not giving the words their ordinary meaning; indeed, "so far as I can see, all the judges in the courts below were of "opinion that upon whomsoever the duty lay there was in fact "a breach. The absolute duty in respect of acts and forbearances "imposed by statutes for the protection of workmen is by this

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[12] [1953] A.C. 643, 660.

[13] [1940] A.C. 242.

[14] Ibid. 258.

"time a well-known feature of this class of legislation. It is to "be found passim in such Acts as the Coal Mines Acts, and in "the Factory Acts themselves." Lord Russell of Killowen[15] poses the same question and answers it by saying: "I think the "duty is an absolute one; the wording is too strong to justify "the milder view. The words 'all staging shall . . . be main-"'tained' point, in my opinion, to an absolute and not a "qualified obligation." Lord Wright says[16]: "The liabilities "imposed by the Factory Act" [in that case the Act of 1901] " . . . create a duty being intended to secure the health and safety "of the workpeople. They are absolute and do not depend on "negligence."

My Lords, the passages I have cited from the judgments in *Smith* v. *Cammell, Laird & Co. Ltd.*[17] lead me to the conclusion that unless there is something in the context to exclude such a construction, a direction such as is found in section 81 (1), contained in an Act, one manifest purpose of which is the protection of workmen, imposes an absolute obligation and not a mere duty to take reasonable care.

Mr. Hunter raised two other points to which I should briefly refer. First, he said that the omission of the definition was a strong point in his favour. I should prefer to adopt the language of Lord MacDermott and say that it merely removes one difficulty from his way. For the reasons I have given I think that even without the definition the word "maintained" in section 81 (1) imposes an absolute obligation.

Secondly, he relied on the word "properly," saying that if Lord Asquith's contention of a similar provision in *Latimer* v. *A. E. C. Ltd.*[18] were correct, the word "so" should be substituted for the word "properly," and he argued that if section 81 (1) imposes an absolute obligation no meaning can be given to the word "properly." It may be that "so" would have been better English, but "properly" makes quite good sense on either construction, and, like Lord Reid (see *Latimer's* case[19]), I see little difference between maintaining a floor or a piece of equipment "properly" and maintaining it "in an efficient state" as required by the definition.

In the result, I find myself in agreement with the reasoning of the Lord Justice-Clerk in the Inner House and I would allow the appeal.

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[15] [1940] A.C. 242, 263.
[16] Ibid. 264.
[17] [1940] A.C. 242.
[18] [1953] A.C. 643.
[19] Ibid. 658.

LORD KEITH OF AVONHOLM. My Lords, the appellant is pursuer in an action of damages brought in the Sheriff Court at Edinburgh against the National Coal Board in respect of injuries received while in their employment in Whiterigg Colliery. The action is based solely on alleged breach of statutory obligation. The Sheriff-Substitute dismissed the action as irrelevant and the Second Division of the Court of Session (the Lord Justice-Clerk dissenting) have refused an appeal against his interlocutor. Against this judgment an appeal has been taken to this House. As the judgments proceeded solely on construction of the statutory obligation in question, it is unnecessary to set out the pursuer's averments further than is necessary to understand the point in issue.

The pursuer avers that while he was operating a winch in a haulage way in the defenders' colliery the winch tipped forward, pinning the pursuer's hand between part of the framework of the winch and a roof girder. The pursuer says this was owing to the absence of stells, or supports, which would have kept the winch in position. The statutory obligation on which he relies is contained in section 81 of the Mines and Quarries Act, 1954, subsection (1) of which is as follows: [His Lordship read the subsection and continued:] The pursuer avers that his accident was caused by the defenders' breach of this statutory duty. The averment proceeds: "The said winch formed part of the equipment "of the said mine at the said colliery. It was accordingly the "defenders' duty to maintain the said winch properly, and in "performance of the said duty to maintain the said winch "securely with stells fitted between the back end of the under-"pinned beams and the roof. In this duty they failed and so "caused the accident. At the time of the accident there were no "stells set in position between the back end of the under-pinned "beams and the roof. But for the defenders' failure in their "statutory duty the accident would not have occurred."

The pursuer would read the words "shall be properly main-"tained" as imposing a continuous obligation to have the equipment at all times conform to the standards previously laid down by the subsection. With reference to the winch this means, he says, to have it at all times in proper and efficient working order. The defenders, on the other hand, would read the words as imposing an obligation merely to attend to, or look after the equipment, an obligation which, with reference to the winch, would cover repairing or servicing it when necessary. This is the issue between the parties. The alternative constructions are very fully and clearly dealt with and developed by the learned Sheriff-Substitute and by their Lordships of the Second Division. The Sheriff-Substitute, and on appeal Lords Patrick and Mackintosh, upheld the defenders' construction. The Lord Justice-Clerk upheld the pursuer's construction. The language used to express the conflicting views may be said to stem from observations and illustrations by Lord MacDermott in this House in *Galashiels Gas Co. Ltd.* v. *Millar*,[20] a case decided under the Factories Act, 1937, a closely analogous statute, with, however, at least one not unimportant difference, which I shall have to deal with later.

"Maintain" may be a word of ambiguous import but ambiguity may disappear in the context in which the word is used. Looking to what is one, if not the main, object of this legislation, namely, to safeguard the workman in the performance of his duties, and having regard to the context in which the words "shall be properly maintained" appear in section 81, I think they should be construed as meaning to keep in proper order by acts of maintenance before the thing to be maintained falls out of condition. To construe the words as covering the restoration of the thing to be maintained to a proper condition by acts of maintenance after it has fallen out of condition would greatly lessen the protection afforded to the workman. Further, the employer is under an absolute obligation of sufficiency in respect of the provision of the things to be properly maintained, and keeping them in that condition is but a continuation of his initial obligation.

A point that moved both Lord Patrick and Lord Mackintosh was that to give effect to the pursuer's contention the section should have run "and shall be so maintained." But that might be too restrictive. I can conceive of cases where machinery might answer the primary requirements desiderated by the statute and yet, by lack of proper attention, might be in a dangerous or unsafe condition. That is a possibility which the legislature may have thought it wise to anticipate. The fact that section 81 (2) provides for regulations for, inter alia, maintenance of machinery or apparatus in no way detracts from this view. The subsection is expressed to be in addition to subsection (1) and covers construction and installation as well as other things.

To read the statute as imposing an obligation merely to attend to, repair, or service would, I think, introduce difficulties, if that meant something more than the common law duty to take reasonable care to keep the machinery, etc., in safe condition. How much more care and what kind of care? If, on the other hand, it adds nothing to the common law duty of reasonable care, the question arises why Parliament should trouble to tack on an existing common law obligation to a number of specific absolute statutory obligations. To do so would be out of line with the general policy of this type of legislation. There was no need to make maintenance a statutory obligation in order to exclude the defence of common employment, for that had disappeared by the time the Act was passed. Lastly, such a limitation of the words "shall be properly maintained" would be out of line with similar legislation in which the safety of workmen is, one cannot say less, but certainly no more important than that of workers in mines and quarries. Factory legislation is a case in point. True, there was a definition of "maintained" in the Factories Act, 1937, as meaning "maintained in an efficient state, in efficient working "order and in good repair," which is absent from the Mines and Quarries Act, a fact much relied on by the judges of the majority in the Court of Session and by the learned Sheriff-Substitute. But too much importance can, I think, be attached to this difference between the two Acts.

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[20] [1949] A.C. 275.

There is a close correspondence between many of the safety provisions of the Factory Acts and those of the Mines and Quarries Act. The expressions "shall be maintained" and "shall be properly maintained" occur repeatedly in numerous sections in both Acts. To illustrate, the provisions in section 22 of the Factories Act, 1937, with reference to hoists and lifts, and in section 24 with reference to all parts and working gear, including anchoring and fixing appliances, of every lifting machine, are closely comparable with section 81 of the Mines and Quarries Act here in question, and with other sections such as section 28, which provides that winding and haulage apparatus shall be properly maintained. It is difficult to see why in comparable circumstances, where the peril to the workman in life or limb from a breakdown of lifting or haulage apparatus is no less in one case than the other, the respective Acts should call for a different construction of the words "and shall be properly "maintained."

The judicial outlook on cases of this kind has frequently been emphasised. In *Smith* v. *Cammell, Laird & Co. Ltd.*[21] the statutory regulation was: "All staging shall (i) be securely "constructed of sound and substantial material and shall be "maintained in such condition as to ensure the safety of all "persons employed; (ii) be inspected at regular and frequent "intervals by a competent person." The facts are not material. I cite the case only for the observations made on the nature and effect of the obligation. There was no definition of "maintained" in the Factory and Workshop Act, 1901, under which the regulations were made, or in the regulations. The regulation, it will be observed, states the purpose for which all staging had to be maintained, namely, to ensure the safety of all persons employed, but that may indeed be taken generally to be the purpose of obligations imposed on employers under the Factories and Mines Acts, and no particular emphasis was placed upon that express purpose in the speeches in this House. Lord Atkin poses these questions with reference to the occupiers of the staging[22]: ". . . is the duty so imposed an absolute one?: or is it to be "construed as limited to a duty to take reasonable care to main- "tain?: or to maintain only while they are themselves using the "staging?" For present purposes this last question may be ignored. Lord Atkin proceeded: "The absolute duty in respect "of acts and forbearances imposed by statutes for the protection "of workmen is by this time a well-known feature of this class of "legislation. It is to be found passim in such Acts as the Coal "Mines Acts, and in the Factory Acts themselves. A striking "example, as was pointed out by Mr. Shawcross in his powerful "reply, is to be found in the obligation to fence dangerous "machinery which in the Act of 1901 is to be found in section 10. "It is precisely in the absolute obligation imposed by statute to "perform or forbear from performing a specified activity that a "breach of statutory duty differs from the obligation imposed by "common law, which is to take reasonable care to avoid injuring "another." Lord Russell of Killowen said[23]: "The duty being, "as I think it is, effectively cast upon the respondents, is it an "absolute duty, or can they excuse themselves by saying that "by competent inspection at regular and frequent intervals they "have done everything possible to discharge their duty? I think "the duty is an absolute one: the wording is too strong to justify "the milder view. The words 'All staging shall . . . be main- "'tained' point, in my opinion, to an absolute and not a qualified

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[21] [1940] A.C. 242.

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[22] [1940] A.C. 242, 258.

[23] Ibid. 263.

" obligation." Lord Wright, with reference to liabilities generally, imposed by the Factory Act, said [24]: " They are absolute and " do not depend on negligence."

Most of the cases to which your Lordships have been referred were cases under the Factories Acts, 1937 and 1948, which contain the definition of " maintained," and when the question of the meaning of " shall be properly maintained " or similar expressions arose the definition was naturally relied on both in argument and judgment. But on occasions some of their Lordships in this House have ventured on observations on the meaning of these words apart from the definition. In *Latimer* v. *A. E. C. Ltd.*[25] Lord Asquith of Bishopstone, with reference to section 25 of the Act of 1937 requiring that " All floors . . . shall be of sound " construction and properly maintained," said: " If these words " stood alone and there were no definition of the word ' maintain ' " in the statute, for myself I should be in little doubt as to their " interpretation. I should take them to mean that at the time of " its construction or installation the floor should possess the " structural qualities which a floor ought to possess—e.g., a level " surface and sufficient strength to bear the stresses to which it is " liable to be subjected—and that from that time on the owner " of the factory should keep up, prolong or perpetuate that " structural condition." Lord Reid in the same case said [26]: " ' Maintained ' is the dominant word throughout and that throws " one back to what is meant by maintaining a floor. I see little " difference between maintaining a floor ' properly,' as required " by section 25 and maintaining it ' in an efficient state ' as " required by the definition."

The case of *Galashiels Gas Co. Ltd.* v. *Millar* [27] was much relied on by the respondents, as proceeding on the definition of " maintained " in the Factories Act. That, I think, was clearly so. It was a factor in the case which could not be overlooked. But when one finds such a striking similarity, if not identity, of language used in two statutes having the same general purpose, to protect the workmen in occupations involving the same types of risk, the conclusion, in my opinion, should be, if the matter is in doubt, that Parliament intended them to have the same meaning, unless some compelling reason in the structure of the particular enactment or context of the prohibition or obligation requires an opposite construction.

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[24] [1940] A.C. 242, 264.

[25] [1953] A.C. 643, 660.

[26] Ibid. 658.

[27] [1949] A.C. 275.

In this case I would read the words "and shall be properly "maintained" in section 81 (1) of the Act of 1954 as imposing an absolute obligation to keep the equipment in question at all times in a sound state of repair and fit for use. I would make one reservation. This obligation may not involve a higher measure of obligation than would be involved in the initial obligation of providing the parts of the machinery and apparatus referred to in the section. I say this is in view of some observations by Lord Patrick in the Court of Session on the development of latent defects. If a latent defect developed so that it became patent it may be said that the apparatus was not being properly maintained so long as the defect continued to be patent. If the apparatus collapsed suddenly from a latent defect which had never disclosed itself before the accident the position might be otherwise. I consider it unnecessary to express any opinion on the implications arising from the reference to "free from patent defect" in section 81 (1) of the Act of 1954. The matter may come up for consideration in some other case. The section of the Factories Act under consideration in the *Galashiels Gas Co.'s* case [27] contained no reference to patent defect, though such a reference does exist in some other sections of the Factories Act and was considered in one case in the Outer House by Lord Wheatley in *M'Neil* v. *Dickson & Mann Ltd.*[28]

In my opinion, the Lord Justice-Clerk came to the right conclusion on the construction of the statute, and I would allow the appeal.

LORD JENKINS. My Lords, I agree. This case turns wholly upon the meaning of the words "properly maintained" in section 81 (1) of the Mines and Quarries Act, 1954. [His Lordship read the subsection and continued:]

The question is whether the injunction that the machinery and apparatus to which this provision relates "shall be properly "maintained" means, as the appellant workman contends, that it shall be kept in a state of good repair and safe condition, or, as so far successfully contended by the respondent board, means that it shall be properly serviced and looked after. The former view imports a continuing and unqualified obligation as to the state of the machinery or apparatus which is broken whenever it is not in fact in good repair and safe condition, no matter from what cause; while the latter view imports an obligation to look after and

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[27] [1949] A.C. 275.

[28] 1957 S.C. 345.

" service " the machinery or apparatus, to establish a breach of which obligation it is necessary to prove not merely that the machinery or apparatus is not in fact in good repair and safe condition, but that its defective state is due to something done or omitted in the performance of the duty of servicing and looking after it.

Requirements as to the maintenance of plant, machinery and so forth expressed in injunctions that the things in question shall be properly maintained, or in comparable terms, were and had for many years been current in cognate protective legislation at the time when the Act of 1954 became law.

Thus, by section 10 (1) (*d*) of the Factory and Workshop Act, 1901, it was provided that the fencing of dangerous parts of machinery " must be constantly maintained in an efficient state " while the parts required to be fenced are in motion," and section 11 of the same Act relating to steam boilers required (by subsection (2)) that " every such boiler . . . must be maintained " in proper condition."

Passing to the Factories Act, 1937, one finds that by section 16 " All fencing or other safeguards provided in pursuance of the " foregoing provisions of this Part of this Act shall be . . . constantly maintained . . . while the parts required to be fenced or " safeguarded are in motion or in use . . . "

Section 22 (1) of the Act of 1937 provides: " Every hoist or " lift shall be of good mechanical construction, sound material " and adequate strength, and be properly maintained."

Section 24 of the Act of 1937 provides (by subsection (1)) that " All parts and working gear . . . of every lifting machine shall be " of good construction, sound material, adequate strength and " free from patent defect, and shall be properly maintained." It will be seen that the requirements here with respect to cranes and lifts are identical with those in section 81 (1) of the Act of 1954 with respect to machinery and apparatus, except that section 81 (1) has " suitable material " whereas section 24 (1) of the Act of 1937 has " sound material."

Section 25 of the Act of 1937 provides (by subsection (1)): " All floors, . . . shall be of sound construction and properly " maintained," and (by subsection (4)): " All ladders shall be " soundly constructed and properly maintained."

Subsection (1) of section 152 of the Act of 1937 defines " maintained " as meaning " maintained in an efficient state, in " efficient working order, and in good repair." The Act of 1954 contains no such definition.

It appears that there has been no previous decision on the meaning of the words "properly maintained" in section 81 (1) or elsewhere in the Act of 1954, which contains many other instances of the use of the word "maintained" in conjunction with the word "properly" or otherwise.

There are, however, several cases in which the meaning of the words "properly maintained" in the various provisions of the Act of 1937 to which I have alluded have been considered. These cases, which include the case in your Lordships' House of *Galashiels Gas. Co. Ltd.* v. *Millar*,[29] all accept the meaning of the words "properly maintained" contended for by the appellant in the present case, that is to say, they hold (in effect) that the injunction in the particular provision that the thing in question "shall be properly maintained" imposes an absolute and continuing obligation to keep it in a state of good repair and safe condition.

Were it not for the presence in the Act of 1937 of the definition of the word "maintained" quoted above, which has no counterpart in the Act of 1954, I would have no hesitation in regarding the case of *Galashiels Gas. Co. Ltd.* v. *Millar* [29] as sufficient to conclude the present question in the appellant's favour. The process of construing one statute by reference to another, and treating decisions on the meaning of the latter as determining the construction of the former is a process which should be applied with caution. But in the present case the language, the subject-matter and the intent of (for example) section 24 (1) of the Act of 1937 and section 81 (1) of the Act of 1954 are so closely allied that (apart from the ground of distinction afforded by the omission from the Act of 1954 of the definition contained in the Act of 1937, whatever it may be worth) it would, to my mind, be clearly wrong to give the words "properly maintained" in section 81 (1) a different meaning from that which has been authoritatively assigned to precisely the same words in comparable provisions of the Act of 1937. I confess I would not willingly attribute this to my mind untoward effect to the absence from the Act of 1954 of the definition in the Act of 1937. It would, as I think, be manifestly absurd if the same statutory language applied to two precisely similar machines with precisely similar defects contracted in precisely similar circumstances should give rise to a breach of statutory duty with respect to one of them, but not with respect to the other, merely because the locus in quo was in the one case a mine and the other a factory.

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[29] [1949] A.C. 275.

Turning now to the authorities, I should begin with a reference to *Smith* v. *Cammell, Laird & Co. Ltd.*,[30] where it was held that the requirement of regulation 11 (*b*) in Part II of the Shipbuilding Regulations, 1931, that "All staging shall (i) be securely con-"structed . . . and shall be maintained in such condition as to "ensure the safety of all persons employed" imposed an absolute statutory obligation. Lord Atkin said this[31]: "If then the duty "is imposed upon the only occupiers of this shipbuilding yard, "the respondents, is the duty so imposed an absolute one?: or "is it to be construed as limited to a duty to take reasonable care to "maintain?: or to maintain only while they are themselves using "the staging? I can see no reason for not giving the words their "ordinary meaning; indeed, so far as I can see, all the judges "in the courts below were of opinion that upon whomsoever the "duty lay there was in fact a breach. The absolute duty in "respect of acts and forbearances imposed by statutes for the "protection of workmen is by this time a well-known feature of "this class of legislation. It is to be found passim in such Acts "as the Coal Mines Acts, and in the Factory Acts themselves. "A striking example, as was pointed out by Mr. Shawcross in "his powerful reply, is to be found in the obligation to fence "dangerous machinery which in the Act of 1901 is to be found in "section 10."

The language of the requirement in that case was, of course, different from the language of section 81 (1) of the Act of 1954 which your Lordships now have to construe; but the passage I have quoted is useful for its recognition of the well-settled principle that in protective legislation such as the Acts of 1937 and 1954, a requirement in unqualified terms that a given thing shall or shall not be done, or that a given state of affairs shall be produced, preserved or prevented, imposes an absolute statutory obligation to do or forbear from doing the act in question, or to produce, preserve or prevent the state of affairs in question. The statute may, of course, use language modifying this result, but if it does not, qualifying words such as "so far as practic-"able" are not to be read into it. In this connection I would also refer to the case in your Lordships' House of *John Summers & Sons Ltd.* v. *Frost*,[32] and, in particular, to the observations of my noble and learned friend, Lord Simonds.[33]

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[30] [1940] A.C. 242.

[31] Ibid. 258.

[32] [1955] A.C. 740 (H.L.); [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

[33] [1955] A.C. 740, 751 et seq.

Reference should next be made to the case of *Cole* v. *Blackstone & Co. Ltd.*,[34] where an accident happened through the breaking of a rung of a ladder, and the question was whether the ladder had been properly maintained, as required by section 25 (4) of the Act of 1937, and Macnaghten J. held that it had not, and that the obligation imposed by section 25 (4) was absolute. It is clear, however, that the learned judge proceeded wholly on the ground that section 25 (4), read in conjunction with the definition, required the ladder to be maintained " in an efficient state " and " in good repair," and expressed no view as to the effect which the words " properly maintained " might have had apart from the definition.

I may next refer to the *Galashiels Gas Co. Ltd.'s* case.[35] That case concerned a claim under section 22 (1) of the Act of 1937 in respect of the failure of a lift, and their Lordships reached a similar conclusion to that of Macnaghten J. in *Cole* v. *Blackstone*,[36] which was cited with approval. Their Lordships, as of course was to be expected, decided the case on the nature and extent of the duty imposed by the words " properly maintained," as explained by the definition, and it was not necessary for them to consider what the position might have been if the definition had not been there. But looking at the judgments as a whole I find nothing to indicate that they might not have reached the same conclusion if no definition of " properly maintained " had been given in the Act of 1937, though I hasten to add that I do not hazard the opinion that they would necessarily have done so.

The competing views as to the construction of the words " properly maintained " (of course, in that case read in conjunction with the definition) are well described in this passage from the judgment of Lord MacDermott[37]: " My Lords, the word " ' maintain ' when used in relation to the state or condition of " things is not always used in the same sense. It may be used to " indicate the continuance of a particular state or condition, as " when one says of someone that ' he maintains his buildings just " ' as they were.' But on occasion it takes colour from the work " of maintenance and is used in reference to the acts done or " requisite to be done in the course of maintenance, as when one " says of another that ' he maintains his buildings methodically.' " This latter use gives the word ' maintained ' in relation to " machinery rather the meaning of ' serviced ' or ' looked after ' " or ' attended to '—I doubt if there is an exact synonym—and

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[34] [1943] K.B. 615; 59 T.L.R. 374.

[35] [1949] A.C. 275.

[36] [1943] K.B. 615.

[37] [1949] A.C. 278, 286–287.

"it was in this sense, according to the appellants' argument, that "the word ought to be read in section 22 (1). If that argument "prevails the appeal should succeed, as the Lord Ordinary has "found that the appellants took 'every practical step to ensure "'that the lift mechanism worked properly and was safe to use,' "and, again, that 'the failure of the brake was one which, "'apparently, nobody could have anticipated or, after the event, "'explain.' My Lords, had the legislature thought fit not to "define 'maintain' Mr. Guest's submission on this aspect of "the case would have encountered less difficulty." It may be noted that Lord MacDermott does not say that apart from the definition Mr. Guest's argument would have succeeded, but only that it would have encountered less difficulty.

The only other case to which I can usefully refer is the case in your Lordships' House of *Latimer* v. *A. E. C. Ltd.*[38] In that case the floors of a factory became covered with flood water mixed with oil by which they were made slippery, and a workman who had slipped on one of these floors and injured his ankle sued his employers for breach of their statutory duty under section 25 (1) of the Act of 1937, and their Lordships, reading section 25 (1) in conjunction with the definition of "maintained" in section 152 (1), held that the employers were not in breach of section 25 (1) by reason of the presence of the oily flood water on the floor which, apart from the fortuitous incursion of this source of danger, was soundly constructed and in an efficient state. My noble and learned friend, Lord Reid, observed[39]: "But I do not think that "there is really any ambiguity here. The requirement of the "definition is not that the floor shall be in an efficient state; it is "that the floor shall be maintained in an efficient state. 'Main-"'tained' is the dominant word throughout and that throws one "back to what is meant by maintaining a floor. I see little "difference between maintaining a floor 'properly,' as required "by section 25, and maintaining it 'in an efficient state' as "required by the definition. I have already said that I do not "think that maintaining a floor includes keeping dangerous things "away from it." Lord Asquith of Bishopstone, after reading section 25 (1) of the Act of 1937, observed[40]: "If these words "stood alone and there were no definition of the word 'maintain' "in the statute, for myself I should be in little doubt as to their "interpretation. I should take them to mean that at the time

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[38] [1953] A.C. 643.
[39] Ibid. 657–658.
[40] Ibid. 660.

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" of its construction or installation the floor should possess the " structural qualities which a floor ought to possess—e.g., a level " surface and sufficient strength to bear the stresses to which it " is liable to be subjected—and that from that time on the owner " of the factory should keep up, prolong or perpetuate that " structural condition."

In this state of the authorities, it is clear that the presence in the Act of 1937 and absence from the Act of 1954 of the definition of the word " maintained " prevents the *Galashiels Gas Co. Ltd.'s* case [41] from amounting to a decision on the meaning of the words " properly maintained " simpliciter, by which your Lordships should consider yourselves bound to decide the present case in the appellant's favour, and the matter is to that extent at large.

It is therefore necessary to consider de novo but with due regard to their legislative history what meaning should be attributed to the words " properly maintained " in section 81 (1) of the Act of 1954, bearing in mind that the manifest object of that subsection is to protect workmen from being injured by defective plant.

The question is not capable of any great elaboration. In my view, the primary meaning as ordinary English words of the words " properly maintained " when applied to machinery is " to keep " up or preserve in a proper state." It is true that the word " maintain " is sometimes used in relation to machinery, apparatus, etc., to denote the performance upon it of acts of maintenance, that is to say, acts calculated to keep it up or preserve it, but I would regard this as a secondary meaning. As for the expression " servicing " which has been used to describe the latter meaning of the word " maintain," I take it to be a neologism.

Such being, in my view, the prima facie meaning of the words " properly maintained," I may legitimately test it by reference to the use of these words in earlier enactments dealing with comparable subject-matter. Turning again to the Act of 1901, I find that under section 10 (1) (*d*) " All fencing must be constantly " maintained in an efficient state," and that under section 11 (2) " every such boiler . . . must be maintained in proper condition." In both these instances the word " maintain " is, I think, clearly used in the sense of kept up, kept or preserved. Moreover, I find it difficult to distinguish between the " maintained in proper " condition " of section 11 (2) of the Act of 1901, and the

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[41] [1949] A.C. 275.

"properly maintained" of section 81 (1) of the Act of 1954. I would here call in aid the observation of Lord Reid in *Latimer* v. *A. E. C. Ltd.*,[42] to which I have already alluded, with respect to section 25 of the Act of 1937: "I see little difference," said Lord Reid,[43] "between maintaining a floor 'properly' as required by "section 25 and maintaining it 'in an efficient state' as required "by the definition." I would also refer again to the observations of Lord Asquith in the same case[44] regarding the meaning of the word "maintained."

There is no doubt that the board's construction of the words "properly maintained" in section 81 (1) would make the protection from injury due to defective plant which the subsection is designed to provide for workmen substantially less effective than it would be on the construction contended for by the appellant. That is always a relevant consideration in cases of this kind, though anxiety to make the protection of the workmen effective should not be allowed to strain against the employer the provisions of a penal enactment (see *per* Lord Porter in *Latimer* v. *A. E. C. Ltd.*[45]).

I have found it impossible to formulate with any degree of certainty or precision the nature and scope of the duty laid upon the respondent board on the construction of the words "properly "maintained," for which they contend; and this surely is in itself a reason for preferring the other construction.

I have already expressed my reluctance to adopt, unless constrained to do so, a construction of section 81 (1) which would make the duty under that subsection different from the duty under the closely comparable provisions of the Act of 1937. In this connection it should be borne in mind that the question whether given premises fall within the category of mines or within that of factories, or partly in one and partly in the other, may well be the subject of considerable doubt and difficulty.

Other things being equal, I think a construction which produces uniformity between the two enactments is clearly to be preferred to a construction which produces anomalies between them. Whatever the intention of the legislature may have been when the definition of "maintained" was omitted from the Act of 1954, it was surely never intended to set it at variance with the Act of 1937.

I am reluctant to differ from the carefully reasoned opinions of the Sheriff-Substitute and Lords Patrick and Mackintosh, but,

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[42] [1953] A.C. 643, 657–658.

[43] Ibid. 658.

[44] Ibid. 660.

[45] Ibid. 654.

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having considered them with care, I have formed a decided preference for the opinion of the Lord Justice-Clerk, whose views, as therein expressed, substantially accord with my own.

For these reasons I would allow this appeal.

Appeal allowed.

Solicitors: *O. H. Parsons for Simpson & Marwick, W.S., Edinburgh; D. H. Haslam for G. F. Grosset.*

F. C.

J. C.*
1960
March 21.

CLIFFORD W. L. CALLWOOD . . . APPELLANT;

AND

ELSE E. CALLWOOD . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES.

Conflict of Laws — Immovable property — Devolution — Will — Danish community of property law — Whether applicable by Danish law extraterritorially to immovable property—Whether Danish law or lex situs to be applied by English law.

Evidence—Foreign law—Onus of proof—Affidavit agreeing with United States court on point not in issue.

The question whether the system of community of property between spouses in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned.

In re De Nicols, De Nicols v. *Curlier* (*No. 2*) [1900] 2 Ch. 410; 16 T.L.R. 461 (H.L.) and *Chiwell* v. *Carlyon* (1897) 14 S.C. 61 (Cape of Good Hope) considered.

The testator at the date of his marriage to the respondent in 1905, and thereafter down to his death in 1917, was domiciled in the Danish Island of St. Thomas in the Virgin Islands where (after cession of the Danish Virgin Islands to the United States of America in 1917) Danish law remained in force until 1921. The marriage had the effect under Danish law of subjecting the property of either spouse to the Danish system of community of property between spouses, and by a joint will of the testator and the respondent the latter was, inter alia, given the right, if she survived the testator, of retaining their joint estate undivided with their children. There was vested in the testator at the time of his death

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* *Present:* LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

Great Thatch Island in the British Virgin Islands, and the appellant, the only son of the testator and the respondent, was in 1948 granted a lease of that island by a man purporting to act as agent for the respondent. Although the lease was admittedly invalid as not having been executed in compliance with the formalities required by law, the appellant remained in possession.

The respondent thereupon began this action claiming a declaration that by virtue of the joint will the island was her property. The appellant pleaded that the will was ineffective so far as it related to real property in the British Virgin Islands, that the testator died intestate as regards Great Thatch Island, which devolved on the appellant as his heir-at-law. The only evidence of Danish community of property law, which was given by affidavit by an attorney practising in the Island of St. Thomas, was to the effect that the law as stated in the opinion of a court in the United States of America on a question between the same parties was "the law on "this question" (*Callwood* v. *Kean* (1951) 189 F. 2d 565):—

Held, that that mode of providing evidence of foreign law was to be strongly deprecated. The discussion of the Danish law of community in *Callwood* v. *Kean* (supra) was not concerned with the question in the present case, namely, whether in the eye of Danish law the property of spouses to which the rules of community attached included immovable property not situated in Danish territory but in that of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community.

The onus of proving that the Danish law had that extra-territorial effect was on the respondent, and there was nothing in the judgment in *Callwood* v. *Kean* (supra) which could be regarded as evidence that the Danish system of community in force in the Island of St. Thomas applied in the eye of Danish law to land situate in foreign territory. The respondent had, accordingly, failed to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law (post, p. 681).

Quaere, whether, had the respondent proved that, it would have been proper in the circumstances of this case to resolve the conflict between English and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule (post, p. 683).

Judgment of the Federal Supreme Court of the West Indies reversed.

APPEAL (No. 16 of 1959), by special leave, from a judgment of the Federal Supreme Court of the West Indies (Appellate Jurisdiction) (Hallinan C.J., Rennie and Archer JJ.) (July 22, 1958), dismissing, save as to the quantum of damages, an appeal from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Lewis J.) (June 14, 1957).

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands. The rival claimants were the plaintiff (now respondent) Else E. Callwood, the widow of Richard Edward Clifford Callwood (hereinafter called the testator), and the defendant (now appellant) Clifford W. L. Callwood, the only son of the plaintiff and the testator. The testator was born in 1862 in Tortola, one of the British Virgin Islands, and was accordingly a British subject by birth. He retained his British nationality all his life, but at the age of 14 he went to live in the Island of St. Thomas in the Virgin Islands, which was then a Danish colony under Danish law, and lived there until 1913, when he went to live in Germany, where he remained until his death in 1917. He married the plaintiff in London in 1905, and it was common ground that at the time of his marriage and thereafter down to his death he was domiciled in St. Thomas.

Great Thatch Island had formerly belonged to the testator's father, on whose death intestate in 1902 it devolved upon the testator as his heir-at-law under the English law of inheritance then in force with respect to freehold land. At the time of the testator's death Great Thatch Island was still (to use a neutral expression) vested in him.

There were two children of the testator's marriage to the plaintiff, namely, a daughter Waldfriede, who was born in 1906 and died in 1939, and the defendant, who was born in 1908, and who as the only son of the testator became on the testator's death entitled as his heir-at-law to any freehold property devolving on the intestacy of the testator under the English law of inheritance then in force.

No settlement of the property of either spouse was made on their marriage, and in view of this and of the testator's domicile in the Island of St. Thomas it was common ground that (it might be with exceptions not relied on before the Board as material in the present case) the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses (which appeared to have been wholly or partially codified by a Danish Royal Ordinance of May 21, 1845) all movable property wherever situate, and all immovable property situate in St. Thomas, belonging to either spouse at the time of the marriage or subsequently acquired during, or in certain circumstances after the termination of, the marriage.

It was also common ground that, with the important qualifications mentioned below, the application of the Danish system of community in any given case had the effect of making the joint property divisible on the death of either spouse between the surviving spouse and the children of the marriage. But this general proposition was qualified under the Ordinance of 1845 (a) by the reservation to the husband, should he be the survivor, of the right to retain the whole of the joint property undivided until his death or remarriage, with power to dispose (within certain limits) of capital as well as income, thereby postponing and (to the extent of any legitimate expenditure of capital) defeating the interests of the children; and (b) by the reservation to the husband of a power to confer by will on the wife if she survived him the same right to retain the whole joint property undivided until her death or remarriage.

By way of assertion and exercise of the right and testamentary power so reserved to the testator by the Ordinance of 1845 he and the plaintiff on April 25, 1911, made a joint will which provided (inter alia) as follows:

"Paragraph 1

"I, Richard Edgar Clifford Callwood, reserve the right "accruing to me as husband in accordance with Royal Ordinance "of 21st May, 1845, Paragraph 18, Section 1, say to retain, if I "am the survivor, our whole joint estate undivided with our joint "children, as long as I do not marry again.

"Paragraph 2

"I, Richard Edgar Clifford Callwood, do hereby give and grant "to my said wife, Mrs. Else E. Callwood, if she is the survivor, "the same right as mentioned sub Paragraph 1 of retaining our "joint estate undivided with our joint children as long as she "does not marry again.

"As however both of us consider it to be the benefit and "welfare of all concerned, that the said right of retaining our joint "estate undivided should be given me, Mrs. Else E. Callwood, "under certain restrictions, I Richard Edgar Clifford Callwood "and I, Mrs. Else E. Callwood do hereby decide, that the said "right is given with the following restrictions.

"It shall be obligatory for me, Mrs. Else E. Callwood, immediately at the death of my husband to deposit all cash money, "bonds, shares and securities, belonging to the joint-estate and "only to draw the interest of same. In case of unforeseen events, "which will make it necessary to withdraw the money or to make "a change of the securities, this can only be done with the consent of Mr. Jakob Peiffer, living at Biebrich of Rhein, or in the "case of his death with the consent of Mr. Otto Zwanziger of "Biebrich of Rhein or the person to whom the surviving of these "gentlemen may transfer the said authority. . . ."

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Paragraph 2 went on to require the plaintiff to pay or provide for certain annuities as therein mentioned and concluded as follows: "Finally, if Mrs. Else E. Callwood's retaining of our "joint estate should cease only $\frac{1}{3}$ say one third part of our "whole joint estate should accrue to me, Mrs. Else E. Callwood, "while the balance of $\frac{2}{3}$ say two third parts shall accrue to our "joint children share and share alike, as their paternal inheritance."

Paragraph 3 contained provisions with respect to 13 properties in the town of Charlotte Amalie on the Island of St. Thomas, all recorded in the name of the testator's sister Mrs. Peiffer "but of "which the greater part belongs to us" (sc. to the testator and the plaintiff as part of their joint estate). According to a list of these properties given in paragraph 3 one of them, known as No. 38 Dronningensgade, Charlotte Amalie, belonged beneficially to the testator and Mrs. Peiffer in equal shares, two others belonged beneficially as to one-third to Mrs. Peiffer and as to two-thirds to the testator, and the whole beneficial interest in the remaining ten belonged to the testator, but it was clear that the beneficial interests attributed to the testator were regarded by paragraph 3 as part of the joint estate. Put very shortly, the effect of the provision of paragraph 3 with respect to these properties was that Mrs. Peiffer should convey the legal title to the plaintiff but should take a beneficial life interest in all of them upon certain conditions.

It was to be observed that the will contained no specific reference to Great Thatch Island, and therefore only purported to deal with it if it could be considered as included in the general references to "our whole joint estate" and "our joint estate" contained in the will.

The Danish Virgin Islands were ceded to the United States of America on March 31, 1917, but Danish law remained in force there until July 1, 1921.

On or about August 14, 1948, one Osmond Kean purporting to act as agent for the plaintiff granted to the defendant a lease of Great Thatch Island for 25 years from that date at the yearly rent of $50. This lease was admittedly invalid because (assuming that Osmond Kean had authority to grant such a lease) it was not executed under seal and was not recorded in the Register of Titles of the Presidency of the Virgin Islands as required by law. The defendant, however, entered into possession of Great Thatch Island on the strength of that invalid lease and had remained in such possession ever since without payment of rent.

In those circumstances the plaintiff by writ dated April 5, 1955, commenced the present action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was by virtue of the joint will of herself and the testator the property of the plaintiff; possession of Great Thatch Island; and damages for use and occupation.

The trial judge ordered the defendant to give possession of Great Thatch Island to the plaintiff, and to pay damages of $2,880.

The Federal Supreme Court affirmed that decision, but reduced the damages to $840.

1960. Feb 1, 2, 3, 4, 8. *J. G. Foster Q.C.*, *Mark Littman* and *C. A. Brodie* for the appellant. The respondent claims Great Thatch Island under the joint will on the ground that it is part of the community property under Danish law, although it is in British territory. The appellant claims the island on the ground that it was not disposed of by the joint will—it is not mentioned in it—and on the ground, therefore, that the testator, his father, had not disposed of it by his will and that English law, the lex situs, not Danish, applies to the question of the ownership of British territory. There is no evidence that the Danish law of community covered property outside the Danish jurisdiction. The will here only applies to community property; it was not purporting to deal with separate estates. Danish community property law is a conception quite foreign to English common law, and its incidents could not be applied to English law; no application of it is possible because of the general rule that the lex situs governs.

The first proposition is that there was no evidence that the island was part of the community property under Danish law. Evidence of Danish law of community of property was given by Mr. J. A. Bough, an attorney in St. Thomas, who stated that the law was as stated in the opinion of Maris J. in the United States Court of Appeals in *Callwood* v. *Kean*,[1] which was in effect a dispute between the parties to the present appeal. There is, however, it is submitted, nothing in Maris J.'s opinion which gives any evidence as to Great Thatch Island being part of Danish community property. There is no evidence that the community property covered land outside the jurisdiction, and the probability is that that is in fact not so, because it would be realised by the Danes that their system of community property was a very peculiar one. *Callwood* v. *Kean*[1] was not directed to the situation of foreign land outside Danish jurisdiction.

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[1] (1951) 189 F. 2d 565.

In the absence of any proof as to Danish law including foreign land as community property the basic rule is that real property is exclusively subject to the law of the State within whose territory it lies—the lex situs: Maxwell on Interpretation of Statutes, 10th ed., p. 152. What is said in Dicey's Conflict of Laws, 7th ed., p. 512, rule 85, and pp. 516 and 524 et seq., is basic to most of the argument for the appellant here.

Great Thatch Island is not included by Danish law in Danish community property; but, even suppose it were, that would not be recognised by English law. Danish law will not be recognised as including the island in the community property, for the reason that the lex situs governs the devolution of English real property; English law will not recognise the inclusion of the island in Danish community property because English law only recognises such inclusion if it is the result of an express contract or the contract established by the marriage is equivalent to an express contract, but in Danish law the husband is the absolute owner of the property while he is alive and there is no contractual right in the wife.

If, as is submitted, the island was not part of the joint property, the will does not operate on or affect it. If, on the other hand, it was part of the joint estate, then the way it is part of the joint estate is not recognised by English law if it is not a contractual right. Either way, English law does not recognise Danish law, whatever it may be—there is no evidence of it. [Reference was made to *De Nicols* v. *Curlier* (*No. 1*).[2]] There is no evidence that Danish law is like French law and that it gives a contractual right; in fact, what evidence there is shows that it is like Scottish law, namely, that the wife has a hope of succeeding. For it to be a type of community property recognised by English law there must be something in the nature of an express contract. The Danish system will not be recognised by English law—it creates an estate which does not exist in and is not recognised by English law. The United States case (*Callwood* v. *Kean*[3]) does not even begin to prove that there was either an express contract or the legal system equivalent to express contract. The whole ratio of *De Nicols* (*No. 1*)[4] is that French law prescribed a contract which is equivalent to an express contract. [Reference was made to Dicey's Conflict of Laws, 7th ed., p. 526.] In *In re De Nicols, De Nicols* v. *Curlier* (*No. 2*)[5] there is a special contract—to be found in the Code; the Danish law is not like the French law; the present case does not come within *De Nicols* (*No. 2*),[5] assuming that that case is right; it is submitted that it is wrong. Even if that case is correct, the present is not a type of case where there was a special contract in the terms used by Kekewich J. Marriage in the Danish case, like marriage in England, established status and some incidents of succession; the contract as regards status does not become a contract as to property unless, like the French, it spells out the rights and obligations of the parties.

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[1] 189 F. 2d 565.

[2] [1900] A.C. 21; 16 T.L.R. 101 (H.L.).

[3] 189 F. 2d 565.

There are many instances of the operation of the lex situs—British wills affecting foreign land and foreign dispositions affecting British land—but they are all part of the general rule regarding the lex situs in rule 85 of Dicey. The general principle is laid down in *Nelson* (*Earl*) v. *Bridport* (*Lord*),[6] which is a very strong example of the rule that the lex situs governs: see also *In re Hoyles*[7] and *Duncan* v. *Lawson*.[8] The respondent is inevitably driven on to the will as the source of her claim. She is faced with the difficulty that the will does not purport to dispose of anything; it assumes that the Danish law of succession is working on the immovables. But the Danish law of succession will not apply as being that of the domicile of the testator; it is only the lex loci. In *In re Miller*[9] the question is the same—is the essential validity and effect of the will to be decided by the law of the place where the land is, or is it to be decided by the law of the domicile of the testator?—and it was held there to be the former. Two further cases of the same nature are *In re Berchtold*[10] and *Chiwell* v. *Carlyon*.[11] The latter decision was that in South Africa, community covers foreign land, and change of domicile under South African law would not affect the community of property: that case has no direct bearing on the present case. [Reference was also made to *Beaudoin* v. *Trudel*[12]; to Dicey,

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[4] [1900] A.C. 21.

[5] [1900] 2 Ch. 410, 413; 16 T.L.R. 461.

[6] (1845) 8 Beav. 527, 568, 570–574.

[7] [1911] 1 Ch. 179, 184; 27 T.L.R. 131.

[8] (1889) 41 Ch.D. 394, 396; 5 T.L.R. 402.

[9] [1914] 1 Ch. 511, 517.

[10] [1923] 1 Ch. 192.

[11] (1897) 14 S.C. 61, 65 (Cape of Good Hope).

[12] [1937] 1 D.L.R. 216, 223.

7th ed., p. 524, Exception 2; p. 647; and to the passages from Story on the Conflict of Laws, s. 158, cited by Kekewich J. in *De Nicols* (*No. 2*).[13]] In considering the effect of marriage on a woman's real estate, regard must be had to the lex situs, which here was English domestic law as to real estate: *Welch* v. *Tennent*.[14] The reasoning in that case is inconsistent with that of Kekewich J. in *De Nicols* (*No. 2*).[15]

Summarising the first two propositions: (1) Great Thatch Island is not part of the joint estate under Danish law. (2) If it is part of the joint estate under Danish law, then it is not part of the joint estate under English law for the following reasons: (a) Great Thatch Island is subject to the lex situs, namely, English law. (b) If (a) is correct, English law does not recognise the Danish law of marriage as affecting a British immovable unless there is a special contract which is either an express contract or one created by the Code or law of the land. (c) There is no evidence of any special contract. (d) The evidence there is seems to indicate that the Danish law of community is a law of succession and not of contract. (e) Even if there is a special contract, British law does not recognise the Danish law of community, since it creates interests in land unknown to British law. (f) Marriage of itself does not create a special contract; there must at least be a *De Nicols* (*No. 2*) [15] type of special contract. If the proposition were right that marriage is a contract affecting immovables, the decision of the House of Lords would not have been correct; and it would make rule 85 subject to an exception which would be much wider than the present Dicey exception.

The third part of the argument is that *De Nicols* (*No. 2*) [15] was not rightly decided for a number of reasons. It is contrary in principle to the rule about lex situs. In that case the contest was between the matrimonial domicile and the lex situs. The validity of a marriage contract affecting an immovable is decided by the lex situs, and the matrimonial domicile of the parties is not the governing law. English law does not recognise the marriage contract, which refers to specific provisions of the foreign Code, as affecting an English immovable because of the rule that the lex situs governs the transfer and devolution of land. That rule is founded on the doctrine of convenience; to hold otherwise would be to subject English land to the transfer and creation of interests and estates which, even if they were not contrary to what English law recognises, would be of impossible application.

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[13] [1900] 2 Ch. 410, 415.

[14] [1891] A.C. 639.

[15] [1900] 2 Ch. 410.

Lastly, Great Thatch Island is not mentioned in the will; there are no words of devise of the joint estate in the will, and there is nothing to show that the joint estate was devised. Even if the respondent is right on all the above points, she must still fail because there is no claim possible under the will because the joint estate is not given to the wife.

Littman following. If it is sought to say that a foreign law affecting title to land operates outside its jurisdiction, it should be proved specifically. On the general principle of private international law as to what extent English law would recognise foreign law which had purported to affect real property in the United Kingdom, see *Freke* v. *Lord Carbery*.[16]

If the disposition in the joint will was a contract, an interest disposed of would not be effective unless it complies with the provisions of the Wills Act: Jarman on Wills, 8th ed., p. 32, and *In the Goods of Morgan*,[17] which shows that a deed may be testamentary even though not in form. It is submitted that the finding of the courts below, that this joint will had been executed in accordance with the provisions of the Wills Act, is not supported by the evidence.

There is no evidence to suggest that this was a partnership; it is a little artificial to apply the cases Kekewich J. referred to in *De Nicols* (*No. 2*) [18] to the present case.

J. G. Le Quesne and *Mervyn Heald* for the respondent. On the question whether Great Thatch Island is part of the joint estate which is affected by the will—that is quite apart from any question of conflict of laws and is merely a question of construction of the will—the fact that the will does not mention Great Thatch Island is of no importance. There is in the will a description of property and that is just as effective as bringing that property within the terms of the will as is a specific mention. The impact of the will on Great Thatch Island was to give to the respondent a right to retain the joint property undivided with the children of the marriage after her husband's death. The will must be interpreted according to Danish law, so the question comes down to whether by Danish law the island was included in the joint estate. That leads to what was proved to be the Danish law by the evidence in this case. Under South African law foreign land did fall within the community right; also, according to the expert evidence of French law which was accepted in *De Nicols* (*No. 2*),[19] the same thing is true of the law of France.

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[16] (1873) L.R. 16 Eq. 461.

[17] (1866) L.R. 1 P. & M. 214.

[18] [1900] 2 Ch. 410.

[19] Ibid.

It was said for the appellant on this point that there was no evidence that Danish law of community property applied to land outside Danish territory. That was a question of fact on which there are concurrent findings of the two courts below. In both judgments there are findings that Great Thatch Island was by Danish law part of the joint property. One finds here some evidence that joint property by Danish law included foreign land. That being so, this Board will not conduct further investigation into the evidence. In the United States case (*Callwood* v. *Kean* [20]) the court was making a general statement of the Danish law and not confining itself to the law applicable to the property there in question; the judgment said that "under the Danish "law from very early times husband and wife held their property "in community"; that is the most important statement in that judgment for the purposes of the present respondent. It means *all* the property. There are exceptions mentioned in the judgment, not applicable here, e.g., property acquired by inheritance or by marriage settlement; there is, therefore, no room for speculating that separate property might also arise in some other way. By Danish law the rules of community property apply to *all* the property, not simply to property within the Danish jurisdiction, and therefore to Great Thatch Island.

Next, assuming that the respondent has by Danish law an interest in the island, is that interest one which the law of the Leeward Islands recognises? Mr. Foster relied on the general rule of English law that title to real property is governed by the lex situs. That general rule is not disputed, but it is submitted that it is rather different from that for which Mr. Foster argued. *Nelson (Earl)* v. *Bridport (Lord)* [21] is only authority for the proposition that there cannot be any interest in or disposition of English land which is prohibited by English law. In the other cases cited by Mr. Foster as examples of the application of the lex situs one finds that that is what is happening over and over again: *In re Hoyles* [22]; *Duncan* v. *Lawson*.[23] The whole question argued in *In re Berchtold* [24] is not the one with which this Board is concerned. *Beaudoin* v. *Trudel* [25] does not really touch the present matters. There is nothing in the above cases to show that the general rule goes further than to prevent the creation of any interest in or disposition of land forbidden by the lex situs; and see Dicey, 7th ed., p. 512.

[20] 189 F. 2d 565, 573.

[21] 8 Beav. 527.

[22] [1911] 1 Ch. 179.

[23] 41 Ch.D. 394, 395.

[24] [1923] 1 Ch. 192, 199–200.

[25] [1937] 1 D.L.R. 216.

The application of the lex situs may itself lead one to a different system of law. The question is left open by the general rule whether English law will recognise an interest arising by foreign law and not prohibited by the law of England. English law will recognise such rights: *Chiwell* v. *Carlyon* [26]; Cheshire's Private International Law, 5th ed., pp. 507, 554–567. English law does recognise certain interests arising by foreign law which are not prohibited by English law, and among them is that of spouses in joint property on marriage. One may say that that is an exception to the general rule. The true effect and extent of *Nelson* (*Earl*) v. *Bridport* (*Lord*) [27] is stated in Cheshire at p. 567. *In re Miller* [28] does not touch the question whether English law will recognise an interest in English land provided for by foreign law; and whether English law will recognise community property in English land arising on a foreign marriage either by contract or by operation of foreign law did not arise in *Welch* v. *Tennent* [29]; the vital question here was conceded in that case, which is no authority for it.

The right claimed by the respondent here is one arising by foreign law and not prohibited by English law, and the general rule does not provide the answer to the present problem. All that it is necessary for the respondent to establish is that when one has community of property arising on marriage by foreign law, then English law recognises rights so arising even in application to English land. There are only two cases—*Chiwell* v. *Carlyon* [30] and *De Nicols* (*No. 1*) [31]—in which that question has come before the English courts, and in each rights arising by foreign law were in fact recognised. Mr. Foster said that those two cases were exceptions to the general rule, and were exceptions depending essentially on contract. It is submitted in answer: (1) Those cases are not exceptions to the general rule, but are cases falling outside it. (2) When examined, they do not really depend on contract in the proper sense of that word at all. (3) Conversely, and alternatively, if they do depend on contract, then in the sense in which contract was present in those two cases it is also present in this case. Those appear to be the only cases in which English courts have had to consider rights arising under a foreign community property law; there are in both cases rights which arose by operation of foreign law, rights which were not prohibited by English law and rights which were recognised in the rules of English law. Those authorities are not confined to rights arising by express contract, or a marriage which is equivalent to express contract, or by special contract; there is no reason why recognition should be limited to rights which arise in a particular way.

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[26] 14 S.C. 61, 63 (Cape of Good Hope).

[27] 8 Beav. 527.

[28] [1914] 1 Ch. 511.

[29] [1891] A.C. 639, 645.

[30] 14 S.C. 61.

[31] [1900] A.C. 21.

It was also said for the appellant that the respondent did not get any rights in the property because the husband was the absolute owner of it while he was alive, with complete power of disposal. The answer is that in *De Nicols* (*No. 1*)[32] there was an exactly similar right in the husband.

In summary on the main point: it appears from the evidence that by the sole fact of marriage the respondent obtained certain rights in property arising by foreign law, including Great Thatch Island. Those were not rights prohibited by English law; therefore both on principle and by authority those rights are recognised by English law.

As his third point Mr. Foster said that *De Nicols* (*No. 2*)[33] was wrongly decided. It is submitted that it was rightly decided.

Lastly, as to the effect of the will: what was done by clause 2 was to give to the respondent the right to this property which otherwise she would not have had. As a result of the will she was solely entitled to Great Thatch Island. The statute was one which gave the husband power to confer such a right by will; he was nonetheless making a devise. English law will not recognise an interest in land prohibited by English law, but there is no general rule that English law will not recognise an interest unknown to English law and not a prohibited right, and, there being no such general rule, the right which the respondent claims here is one which the English law does recognise.

Foster Q.C. in reply. The argument for the respondent involves rewriting many chapters of Dicey, and involves approximating the law of immovables to movables in the case of marriage and saying that the law of the domicile and not the lex situs applies. The only exception to the general rule that the lex situs governs, which has even been faintly indicated, is Kekewich J.'s decision. The general proposition of law for the respondent that an interest under foreign law will be given effect to, unless prohibited by English law, begs the question; the proposition was, apparently, that any interest in any land in any circumstances to anybody would be given effect to; to follow that to its logical conclusion

[32] [1900] A.C. 21, 25.

[33] [1900] 2 Ch. 410.

would mean that the capacity of somebody to transfer English land would be decided by the law of his domicile. Dicey says that the lex situs governs except where there is an express contract; and that is a completely understandable rule which is supported by the whole trend of authority and by every textbook writer: Dicey, 7th ed., pp. 514, 517, 518, 520. The South African case of *Chiwell* v. *Carlyon*,[34] relied on for the respondent, does not advance either side's argument any further, because it cannot be said what the reasons were which impelled Stirling J. to make a decree. [Reference was also made to Wolff's Private International Law, 2nd ed., sections 334 and 336.] English courts will not give effect to an interest in foreign land which is not recognised or known to English law.

In conclusion, the following propositions derive from the argument: (1) The appellant is claiming English land as heir under English law; he is in possession. (2) The respondent is claiming the right to English land under Danish law, namely, to retain Great Thatch Island. (3) It is not proved that Danish law does comprise Great Thatch Island. (4) To establish the right claimed by her in an English court the respondent must comply with rules (1) and (2) of Dicey—the basic rules; that is, the respondent must apply an English rule of conflict of laws making Danish law applicable; a rule of foreign law is not applied unless there is a rule of English conflict of laws making such laws applicable. (5) The question in this case is one of title to the island. (6) The applicable rule is rule 85 of Dicey, which applies English law to English land. That should be contrasted with rules 127 and 128 (pp. 647 and 655 respectively). Rule 128 shows that the respondent's argument is approximating immovables and movables. (7) The relevant English law, that is, the lex situs, is English domestic law, not, as the respondent argued, foreign law applied by English law. (8) The only relevant exception to the general rule is exception (2), at p. 524 of Dicey. (9) The present case does not come under that exception, because there is no marriage contract or settlement. (10) The term "marriage contract" is an express contract and does not apply to rights implied by the foreign law of the marriage notwithstanding that those rights may be treated by the foreign law as contractual or quasi-contractual. It was said for the respondent that *De Nicols* (*No. 2*)[35] was not a contractual case. (11) If the *De Nicols* (*No. 2*) case is rightly decided, it is only right if the contract is treated as covering a case where the marriage under the foreign law is proved to result in a tacit contract equivalent to an express contract as to land in England. (12) The fallacy in the present case is that such a contract follows from the use of the word "community" in the judgment, or from the existence of Danish community which in reality appears to be rights of succession on the death of a spouse. (13) There is no reason on principle or authority for making a new rule or exception. It was said for the respondent: (a) where one has a right under foreign law, it is applied to English land unless it is prohibited by English law. It is submitted that that is contrary to Dicey's first rule, because one has to find a rule of English conflict of laws which applies a right under foreign law to English land. It was also said for the respondent: (b) where one has a right under the law of the domicile of the foreign marriage to English land, the right is applied. It is submitted that if that rule were accepted it would have to be extended to the law as to intestacy and other matters, because that rule would cover all rights of succession upon marriage followed by the death of one of the spouses. This is contrary to rule 85, is without authority and not right in principle, as it confuses the law of succession and the law of marriage. It was further said for the respondent: (c) where one has a right over English land under foreign law creating community on marriage, that will be applied by English law. That, it is submitted, is not correct, as there is no reason to restrict this rule of community, and it is contrary to rule 85 that English land is governed by English law. It also, of course, conflicts with the rules on intestacy. (14) The will does not operate on English land; it is only carrying out under Danish law an incident of Danish community property law; it is not purporting to, and does not, devise English land.

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[34] 14 S.C. 61.

[35] [1900] 2 Ch. 410.

March 21. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: The question whether so far as immovable property is concerned the Danish system of community in the eye of Danish law extended also to immovable property (such as Great Thatch Island) belonging to one of the spouses but situated outside St. Thomas, and in the territory of a foreign sovereign state, whose own laws did not include the Danish or any other system of community of property between spouses, is a cardinal issue in the present appeal.

On April 23, 1951, judgment was given in the United States Court of Appeals in *Callwood* v. *Kean*,[1] which was an action originally brought by the plaintiff against her former agent, Osmond Kean, for an account of the proceeds of the sale of No. 38, Dronningensgade, but which, on the intervention of the present defendant, developed into a contest as to the title to such proceeds.

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[1] (1951) 189 F. 2d 565.

It appears that after the testator's death Mrs. Peiffer as contemplated by paragraph 3 of the will (and with the concurrence of her husband who predeceased her) made over to the plaintiff all the 13 properties in Charlotte Amalie, and in particular No. 38, Dronningensgade, retaining in all of them a life interest which she continued to enjoy down to her death on July 11, 1947. It further appears that No. 38, Dronningensgade was sold in 1946 by Osmond Kean, purporting to act as attorney for both the parties to the present action. In these circumstances the question which was raised for decision between the present plaintiff and defendant in the United States Court of Appeals (on appeal from the District Court of the Virgin Islands) was in effect whether the entire net proceeds of sale of No. 38 were, as contended by the plaintiff, her absolute property, or, as contended by the present defendant, belonged as to the half-share acquired by the plaintiff from Mrs. Peiffer to the plaintiff absolutely, and as to the other half-share formed part of the joint estate and were subject, accordingly, to the provisions of the Danish law of community and of the joint will made by the testator and the plaintiff under those provisions. The United States Court of Appeals decided this question in the sense contended for by the present defendant, in substance affirming the decision of the District Court. Their Lordships have thought it right to refer at some length to the subject-matter of this earlier litigation in view of the use which, as will shortly appear, was made in the present action of the exposition of the Danish law of community contained in the judgment of the Court of Appeals, directed though it was to the destination under that law of the proceeds of sale of immovable property admittedly situated in territory subject to that law, and in no way concerned with the question whether in circumstances such as those of the present case the Danish system of community in force in the Island of St. Thomas at the material time was in the eye of Danish law applicable to immovable property situated in British territory and subject to English law.

By her statement of claim in the present action the plaintiff alleged (inter alia) (1) that she was the widow of the testator; (2) that the testator was the owner (on the death of his father intestate in 1902) of Great Thatch Island, and continued as such

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owner until the date of his death in 1917; (3) that by the joint will it was agreed by the plaintiff and the testator that she should have the right to retain their joint estate in accordance with the Royal Danish Ordinance of May 21, 1845, Chapter 18, section 1, under the Danish laws then in force in the Island of St. Thomas; and (4) that the plaintiff had elected in accordance with the said law to retain Great Thatch Island as her property, and not to divide the same with her son, the defendant. The plaintiff went on to allege the facts already mentioned concerning the invalid lease, and concluded by claiming the relief already described.

By his defence (paragraph 2) the defendant made no admission of any right in the plaintiff to Great Thatch Island as her property and alleged: (i) that the will of the testator was ineffective in so far as it related to real property situate in the British Virgin Islands and, consequently, the testator died intestate as regards Great Thatch Island; and (ii) that on the death of the testator Great Thatch Island devolved on the defendant, who was the only child (sc. son) of the testator. By paragraph 3 he admitted the facts alleged concerning the invalid lease, but said he entered into it in the mistaken understanding that the plaintiff was entitled to Great Thatch Island for life.

The case was tried at first instance by Lewis J. The only evidence of Danish law before the court consisted of an affidavit of a Mr. James August Bough, an attorney and counsellor at law practising in the Island of St. Thomas, and the judgment of the United States Court of Appeals already mentioned, to which reference was made in such affidavit. Omitting formal parts, the affidavit was in these terms:

" 1. I am an attorney and counsellor at law, and have prac-" tised as such in the Virgin Islands of the United States of " America from the year 1934, except between 1946 and 1954 " when I served with the Department of Trusteeship of the " United Nations, at New York City. The Virgin Islands of the " United States of America were up to March 31, 1917, a colony " of Denmark, and it was common practice for persons to be " married there under the Danish law of community property. " In my practice the question as to what is the Danish law as " to community property has often arisen.

" 2. I have read carefully the opinion of the court delivered " by Maris J. in the United States Court of Appeals for the Third " Circuit in the case of *Callwood* v. *Kean* No. 10310, of January " 29, 1951. I can state categorically that the law on this question " is as stated in that opinion. The copy of the joint will of

"Richard Edgar Clifford Callwood and Else E. Callwood, printed "in said judgment is a true and correct copy of the joint will "under which the plaintiff Else E. Callwood claims in this "action."

Their Lordships strongly deprecate this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which at the material time was Danish territory and accordingly subject to Danish law. The judgment of the United States Court, accordingly, provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community. The judgment of the United States court was likewise not concerned with, and therefore expressed no opinion upon, the rights of spouses subject to the Danish system of community as regards the enjoyment or disposal of the joint property during the continuance of the marriage.

Their Lordships think it desirable to quote at some length from the discussion of the Danish law of community contained in the judgment of the United States court delivered by Maris J., inasmuch as the views therein expressed, as approved by Mr. Bough, provide the only evidence of the Danish law of community adduced in the case. The learned judge says this [2]: "Since the "will involves the title to real estate in St. Thomas it is to be "construed in accordance with the rules of law in force in that "island when the will went into effect on January 17, 1917, the "date of the testator's death. At that time the law in force in "St. Thomas was that of Denmark. The Danish law in force "when the island was one of the Danish West Indies remained "in force, after the change of sovereignty, until July 1, 1921, "when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the "Danish law rules of law based upon the common law of England "as understood in the United States.

"Under the Danish law from very early times husband and

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[2] 189 F. 2d 565, 573.

" wife held their property in community, unless otherwise pro-
" vided by marriage settlement. Moreover one of the provisions
" of the Danish law was that upon the death of a spouse the
" surviving spouse could, under certain circumstances, continue
" to hold their entire joint estate in community until his or her
" death or remarriage, thereby postponing the rights of children
" or other heirs in the community property. This right appears
" to have been established by, and certainly was recognised by,
" the Ordinance of May 21, 1845, which was in force in the
" Danish West Indies. Section 18 of that Ordinance, referred
" to in the will here in question, provides that a husband after
" the death of his wife is not obligated to divide the property
" with their common children, whether they have attained their
" majority or not, so long as he does not remarry unless marriage
" contracts or other binding determinants create the necessity
" for such a division. The section further authorises the husband
" by testamentary disposition to confer on his wife the same
" right to retain the whole property undivided. Section 19 of
" the Ordinance stipulates that the right of the surviving spouse
" to remain in community property as authorised by section 18
" ceases when the spouse remarries.

" It will be observed that the right thus given by the Danish
" law to a husband by his will to authorise his widow to remain
" in possession of their community property or joint estate was
" exercised by the testator here who, by paragraphs 2 and 3 of
" the will, expressly authorised his wife, the plaintiff, to retain
" the whole of their joint estate undivided and to the exclusion
" of their children until her remarriage. It appears that under
" the Danish law a surviving spouse who thus retained possession
" of the community property was entitled to sell or mortgage it
" or otherwise to deal with and dispose of it as absolute owner,
" although perhaps under a duty to compensate their children as
" heirs for any undue diminution in the aggregate value of their
" inheritance. Accordingly, if the testator here had not imposed
" upon the plaintiff the restrictions upon alienation to which
" we have already referred, and the validity of which we will
" presently discuss, she would unquestionably have had the right
" to sell, mortgage or otherwise dispose of the real estate in St.
" Thomas belonging to the joint estate of the testator and herself
" and also the right to take possession of and invest or otherwise
" dispose of the proceeds, being responsible at the most merely
" to compensate their children for any undue diminution, as the
" result of gifts made by her, in the value of their share of the

"joint estate upon her remarriage or death or the earlier division "of the property.

"The rights thus given by the Danish law to the surviving "spouse who retains the joint estate in community cannot be "described in terms of common law concepts since those rights "are quite foreign to the common law. Specifically they cannot "be described as those of trustee and beneficiary, as the district "court suggested in its opinion. Nor is it necessary for us to "attempt to classify them under the common law. It is sufficient to note the rights which the Danish law conferred upon "a widow under these circumstances and to point out that these "rights vested in the plaintiff upon the death of the testator with "respect to the property in St. Thomas which they held in "community, subject only to such restrictions as the testator by "his will validly imposed upon her."

And Maris J. says[3]: "As we have said, under the Danish law, "a surviving spouse retaining possession of the community property is ordinarily entitled to sell or mortgage it or otherwise to "deal with it as absolute owner. In the present case, however, as "we have seen, the testator by his will placed definite restrictions "upon the right of the plaintiff as surviving spouse to deal with "the property. Thus he provided that it might only be sold or "mortgaged with the consent of Jacob Peiffer or Otto Zwanziger "and then only in case of unforeseen events which might make "it necessary for the plaintiff to use principal or to make a "change in the properties in which the joint estate was invested. "Moreover he provided that she should deposit in banks to be "designated by Jacob Peiffer or Otto Zwanziger all money and "securities belonging to the joint estate, including the proceeds "of the sale of any properties."

And again[3]: "It appears that under the Danish law a husband who by his will conferred upon his surviving wife the right "to possession of the community property had also the right to "stipulate that she could dispose of that property only with the "consent of an individual who in Danish is called a 'Tilsyns-'vaerge' which may perhaps best be rendered in English as "'guardian.'"

And[4]: "Accordingly when the testator named Jacob Peiffer "and Otto Zwanziger in his joint will as persons whose consent "was required to the sale or other disposition of the joint property "by his widow he was exercising a right which the law then in

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[3] 189 F. 2d 565, 577.

[4] Ibid. 578.

" force in St. Thomas gave to him. His appointment of these " individuals successively to assume the duties of guardian for " his widow was accordingly entirely valid."

Their Lordships have thought it sufficient to cite these passages from the text of the judgment, as representing the conditions drawn by the court from the sources referred to in the supporting footnotes, to which (and the full judgment as reported) reference may be made.

Before Lewis J. at first instance counsel for the plaintiff put the essence of his case in this way: he said (see Record, p. 9): " Plaintiff's case briefly is that her rights arise under the joint " will and that under that joint will Great Thatch Island was " devised to her notwithstanding it was not specifically mentioned therein. Paragraph 1 of joint will refers to ' whole joint " ' estate.' "

Counsel for the defendant, on the other hand, stated his leading argument thus (Record, p. 10): " Plaintiff must satisfy court " as to the meaning of the words ' joint estate ' in Danish law, " and secondly show that Thatch Island fell within this expression. Evidence as to what Danish law was at the relevant " date in regard to community of property is insufficient. The " affidavit of James August Bough is inadequate in this point."

In the course of his judgment Lewis J. said (at p. 21): " . . . " in the absence of any evidence by the defendant to contradict " or put in issue Mr. Bough's opinion I find as a fact that the " plaintiff and the testator held their property in community when " they were married as it has been admitted by both sides that " there was no marriage settlement which provided otherwise."

At p. 23 he said: " . . . it " (i.e., Great Thatch Island) " is " property which accrued to the testator before his marriage to the " plaintiff and would form part of the community property unless " specifically excluded therefrom by a marriage settlement."

At p. 24 he said: " It is admitted that there was no marriage " settlement and as Great Thatch Island was owned by the testator at the date of his marriage it would, in the absence of " any evidence to the contrary, form part of the joint estate, and " I accordingly hold that it does form part of the joint estate. " Counsel for the defendant has argued that it is for the plaintiff " to show that the words ' our whole joint estate ' in paragraph 1 " of the will included joint estate elsewhere than in St. Thomas. " These words are in my opinion sufficiently comprehensive to " include all property held by the testator and the plaintiff at the " time of their marriage wherever it may be situate and I find "as a fact that the expression 'our whole joint estate' included "Great Thatch Island although it is not specifically mentioned "in the will."

The learned judge went on to hold (at pp. 24 and 25) that the joint will was in a form apt to include land in the British Virgin Islands under the Wills Act, c. 26, there in force, and at p. 25 expressed his conclusion on the question of title in these terms: "In the result I am of the opinion that the plaintiff is entitled "under the provisions of the will to retain Great Thatch Island "as owner to the exclusion of the defendant and I accordingly "declare that she is the owner thereof."

He accordingly made an order upon the defendant to give up possession of Great Thatch Island on September 30, 1957, and to pay mesne profits at the rate of $40 per month for the six years ending on that date.

On appeal by the defendant to the Federal Supreme Court of the West Indies (Sir Eric Hallinan C.J., Rennie and Archer JJ.) that court in a judgment delivered by Hallinan C.J. on July 21 and 22, 1958, in which the other members of the court agreed, accepted Lewis J.'s conclusions both as to inclusion of Great Thatch Island in the joint estate and the efficacy of the joint will, and dismissed the appeal, save that the mesne profits were reduced to a total of $840, representing $80 per annum for a period of 10 years. The learned Chief Justice (at p. 33) observed: "I consider that the trial judge had sufficient evidence before "him to hold that the joint will comprised and destined the lands "in question."

From that judgment the defendant has now appealed to this Board. Mr. Foster, appearing for the defendant, based his argument in support of the appeal primarily on the submission that there was no evidence on which it could be held that the property to which the Danish system of community attached on the marriage of the testator and the plaintiff included in the eye of Danish law Great Thatch Island, situated as it was in British territory and subject to English law.

If that submission is well founded, the present appeal must, in their Lordships' opinion, clearly succeed. The plaintiff's case is that according to Danish law Great Thatch Island formed part of the joint property to which the Danish system of community attached on the marriage of testator and the plaintiff, and devolved on the death of the testator in accordance with that system to the exclusion of the lex situs in the shape of English law. It is for her to prove that in this matter of community the Danish law as it stood in the Island of St. Thomas at the material time arrogated to itself this extraterritorial effect. The question is one of fact to be proved by evidence, and the onus is upon the plaintiff to prove it. As their Lordships have already observed, the only evidence of the Danish law of community adduced by the plaintiff consists of the judgment of the United States Court of Appeals as approved by Mr. Bough in his affidavit. Their Lordships are satisfied that there is nothing in this judgment which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situate in foreign, or, in particular, British, territory. It is true that in various parts of the judgment general references are to be found (for example) to " the " property," " the entire joint estate " and " the community " property " without qualifying words restrictive of their locality; but this, in their Lordships' opinion, is not enough. The law of one country concerning the devolution of land cannot, and prima facie is not intended to, affect the devolution of land situated in the territory of another. The learned judges in the United States Court of Appeals were not directing themselves to the application of the Danish community system in the case of land situated outside Danish territory, and their Lordships find it impossible to assume that, if the question whether Great Thatch Island was according to Danish law to be regarded as part of the testator's and the plaintiff's joint estate under the Danish system of community had been before the United States court, it would have been answered in the affirmative.

It is to be observed that in *De Nicols* v. *Curlier* (*No. 2*),[5] where Kekewich J. held that the contract imputed by the French system of community to spouses domiciled in France and marrying without any express contract (as to which see *De Nicols* v. *Curlier* (*No. 1*)[6] had the same effect as an express contract in like terms, and was enforceable in England against freehold and leasehold property situated there, the learned judge had before him expert evidence to the effect that the term " immeubles " was not confined to immovables in France, but applied equally to immovables in other countries. He said[7]: " The difficulty " which arose was whether the term comprised immovables " abroad—that is, beyond France. The words of the Code are, " apparently, wide enough to cover all, wherever situate, and, if

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[5] [1900] 2 Ch. 410; 16 T.L.R. 461.

[6] [1900] A.C. 21; 16 T.L.R. 101 (H.L.).

[7] [1900] 2 Ch. 410, 414.

"it could be treated as an English instrument which the court "is competent to construe, it would be impossible to avoid the "conclusion that this is its real meaning. But to arrive at a "conclusion respecting the construction of the Code in this particular is beyond the competence of the court. It is a matter "of fact with which the court can only deal according to the "testimony of those qualified to give it."

If the learned judge's view as to the construction which an English court would place on the French code if competent to construe it turned merely on the absence of any express restriction of its provisions to immovables situated in France, their Lordships take leave to doubt its correctness, but they entirely agree with the learned judge in holding that the question whether the French code did on its true construction include immovables outside France was a question of French law and as such "a matter of "fact with which the court could only deal according to the "testimony of those qualified to give it."

Again, in *Chiwell* v. *Carlyon*[8] the first question put by Stirling J. for the opinion of the Supreme Court of the colony was whether certain immovable property in England fell within the community created under the law of the colony by the marriage of spouses domiciled in the colony; and the Supreme Court of the colony held that this question should be answered in the affirmative.

These cases indicate that the question whether the system of community in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned. True it is that in *De Nicols* v. *Curlier* (*No. 2*)[9] the French system and in *Chiwell* v. *Carlyon*[10] the Cape of Good Hope system were proved to extend to immovables situated in another country, but this, of course, affords no evidence at all on the question whether the Danish system of community in force in the Island of St. Thomas during the period material to the present case purported to include immovables situated in other countries.

Mr. Le Quesne, for the plaintiff, contended that there were concurrent findings of fact by both courts below to the effect that the community here in question included immovables situated in the territory of a foreign state, such as Great Thatch Island.

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[8] (1897) 14 S.C. 61 (Cape of Good Hope).

[9] [1900] 2 Ch. 410.

[10] 14 S.C. 61.

Their Lordships cannot agree. It appears to their Lordships that both courts erroneously regarded the judgment of the United States court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish system of community in force in the Island of St. Thomas during the material period included Great Thatch Island notwithstanding that it was situated in the territory of a foreign country. For the reasons already stated, their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that basing themselves on this, as their Lordships think erroneous, view of the evidence, the courts below went on to hold that inasmuch as the community property according to the relevant Danish law included Great Thatch Island, the general references in the joint will to " our whole joint estate " and " our joint estate " must be construed, accordingly, as including Great Thatch Island, a conclusion from which, had there been evidence that according to the relevant Danish law the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the courts below appears to have been that inasmuch as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their Lordships are content to assume in favour of the plaintiff without deciding it) the joint will should be recognised by English law as effectively entitling the plaintiff to the beneficial interest it purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and granting the adequacy of the joint will, in point of form and execution, to create with respect to Great Thatch Island, as part of the joint estate, the beneficial interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule: see, for example, *Welch* v. *Tennent*.[11] Their Lordships are much indebted to counsel for their full and careful argument on this question; but as it appears to their Lordships that the case is concluded against the plaintiff by her

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[11] [1891] A.C. 639 (H.L.).

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failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law, no useful purpose would be served by debating it further.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the Supreme Court of the Windward Islands and Leeward Islands and of the Federal Supreme Court of the West Indies should be set aside, and that the action should be dismissed.

The respondent must pay the costs in the courts below and the costs of this appeal.

Solicitors: *Herbert Smith & Co.; Zeffertt, Heard & Morley Lawson.*

C. C.

J. C.*
1960
April 4.

HONG GUAN & CO. LTD. . . . . APPELLANTS;

AND

R. JUMABHOY & SONS LTD. . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Sale of Goods—Exceptions clause—Contract "subject to shipment"—Construction—Sufficient goods shipped to fulfil contract—Insufficient to meet all vendors' other contracts—Allocation to buyers with "definite" contracts—Purported cancellation of "subject to shipment" contract—Whether effective.

Privy Council—Jurisdiction—Point of law not taken below—Alternative submission on construction of contract—Point which could not be met by further evidence (post, p. 701).

Damages—Market value—Proof—Evidence of compromises in other disputes relating to market value of similar goods (post, p. 703).

In November, 1950, the respondents, importers of cloves into Singapore, contracted to sell to the appellants 50 tons of second grade Zanzibar cloves, December shipment, "subject to force "majeure and shipment." The respondents did in fact ship in December a quantity of cloves sufficient to fulfil the contract, though not sufficient to meet all their commitments to other buyers. They allocated the cloves among the latter, and delivered none to the appellants, to whom they wrote "your shipment was not effected by "the Zanzibar suppliers. Your contract was made subject to . . .

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* *Present*: LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

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"shipment . . . Please consider your contract as cancelled." On a claim by the appellants for damages for breach of contract of sale:—

Held, that "subject to shipment" was to be construed as meaning that the contract was conditional upon the respondents being able to procure, as they were here, the shipment in December, 1950, of cloves of the stipulated quantity and description. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendors, then there would be no contractual force in the document, which would merely give an option to the vendors. The respondents could not be allowed to excuse their non-performance by reference to their other commitments and to seek to give to them priority over the appellants' claims—the contract made no reference to such commitments and they were no concern of the appellants. Accordingly, when the respondents failed to deliver to the appellants the cloves contracted for, and when they purported to cancel the contract, they committed a breach of it and were liable in damages (post, p. 701), the measure of them being the difference between the contract price and the market price at or about the date when the cloves arrived in Singapore.

Hollis Bros. & Co. Ltd. v. *White Sea Timber Trust Ltd.* [1936] 3 All E.R. 895, *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.* (1923) 17 Ll.L.Rep. 7 (C.A.) and *Kokusai Kisen Kabushiki Kaisha* v. *Johnson* (1921) 8 Ll.L.Rep. 434 considered.

Judgment of the Court of Appeal of the Colony of Singapore reversed.

APPEAL (No. 18 of 1958) by leave of the High Court of the Colony of Singapore, against a judgment of the Court of Appeal of that High Court (Rigby and Wee Chong Jin JJ., Knight Ag.C.J. dissenting) (November 15, 1957) dismissing with costs the appeal of the present appellants from a judgment of Tan Ah Tah J. (October 9, 1956) whereby the claim of the appellants was dismissed with costs.

The following facts are taken from the judgment of the Judicial Committee: The claim made by the appellants (plaintiffs) in the action was for damages for breach of contract of sale. The appellants wished to purchase 50 tons of Zanzibar cloves. It was their practice to buy goods in bulk and to make contracts of sub-sale also in bulk. The respondents, according to the testimony of Mr. Jumabhoy, their chairman of directors, were, down to December, 1950, the biggest importers and stockists of cloves in Singapore. Mr. Jumabhoy stated in his evidence that there were two crops of cloves in Zanzibar in a year: one began to come in July and the other, which was larger, began to come in September. He stated that the total crop for the year 1949 was about 7,000 tons and that the 1950 crop was three-and-a-half times larger. He further stated that cloves were usually re-exported from Singapore to Java, there being almost no use for cloves in Singapore. The only type of cloves exported to Singapore for use in Indonesia was the particular type known as second grade Zanzibar cloves. The incidence of rain in Zanzibar, particularly if it came earlier than expected, might affect the picking and accordingly the selling by suppliers and the exporting.

The contract which was sued upon was dated November 7, 1950, and, bearing the respondents' number—number 106—was in one of a variety of forms used by the respondents. Its terms were as follows:

"Bought of R. JUMABHOY & SONS LTD.
"24, MALACCA STREET.
"Sold to MESSRS. HONG GUAN & CO. LTD.
"24, TELOK AYER STREET.
"Term: Cash in silver or bank notes:

"Subject to conditions of sale of the Indian Chamber of "Commerce, Singapore.

"50 Fifty tons Zanzibar cloves second grade, December shipment @ $94½ per picul ex buyer's godown.

"Delivery to be taken within . . . days from date. In default "of delivery being taken within the stipulated time, the under-"signed have the option, without any notice to the purchaser, of "either cancelling the above sale, or of selling the goods by public "or private sale at the risk and expense of the purchaser, or of "retaining them, and if the goods are retained the usual charges "for storage and fire insurance (on the value of the said goods) "will be charged and also interest at the rate of 12 per cent. per "annum from the date on which delivery should have been taken.

"Subject to force majeure and shipment.

"It is at the option of the seller to demand cash before or any "time after delivery of goods.

"N.B.—Buyers must examine the goods before delivery, and "no complaint may be made after delivery of same.

"Bearing interest at 24% per annum after due date of this "order.

"Tare four catties per bag.

"Broker for vendor and purchaser. Sd. R. Jumabhoy
"Sd. Illegible R. JUMABHOY & SONS LTD."

In fact the appellants did not receive any cloves from the respondents. A letter, dated December 29, was sent to them in these terms:

"RODYK & DAVIDSON
"Our Ref: FGV/F
"29th December, 1950.

"Dear Sirs,

"Contract No. 106—50 tons
"Zanzibar 2nd grade cloves

"We are directed by your sellers, Messrs. R. Jumabhoy & "Sons Ltd., to inform you that your shipment was not effected "by the Zanzibar suppliers.

"Your contract was made subject to force majeure and ship-"ment in consequence of which please consider your contract as "cancelled.

"Yours faithfully,
"Sd. Rodyk & Davidson.

"Messrs. Hong Guan & Co. Ltd.,
"14, Telok Ayer Street,
"Singapore."

On November 24, 1950, the appellants had entered into two contracts of sale, each for 25 tons of Zanzibar second grade cloves. One contract was with Messrs. Makhanlall & Co. and the other was with Messrs. Panachand & Co. Amongst other terms each contract included the following:

"Quality: Zanzibar second grade—as received from the "steamer.

"Price: S.S.$99/- per picul (ninety nine only).

"Shipment: December 1950.

"Delivery: At buyer's godown.

"Remarks: Subject to the safe arrival of the steamer and all "force majeure. . . ."

Evidence was given at the hearing of the action that the respondents had been informed by telephone that those two contracts of resale had been entered into. That evidence, contradicted by the evidence of Mr. Jumabhoy, was not accepted by the trial judge, who held that the respondents were not aware of the two contracts of resale until more than a month after they had been entered into and until the time when the appellants were contemplating bringing legal proceedings.

The respondents effected shipments from Zanzibar as follows: They shipped 300 tons on a ship called the *Tjibadak*. Though the actual date of sailing of that ship from Zanzibar was December 1, 1950, it was held, and it was not now disputed, that such shipment was properly to be regarded as a November shipment. The ship arrived at Singapore on January 25, 1951. The only December shipment on behalf of the respondents was of a quantity of 50 tons. It had in fact been hoped that that quantity would have been shipped on the *Tjibadak*. That quantity was actually shipped on the *Ettrick Bank*, which, sailing from Zanzibar on about December 21, 1950, reached Singapore on January 20, 1951, having overtaken the *Tjibadak*.

Inasmuch as the appellants did not receive any cloves from the respondents the appellants were in turn unable to deliver any cloves to Messrs. Makhanlall & Co. or to Messrs. Panachand & Co. In response to the inquiries which those sub-purchasers addressed to the appellants, the solicitors for the appellants stated (in letters dated January 18, 1951): "Our clients have pressed Messrs. "Jumabhoy & Sons Ltd. for delivery of the cloves but they replied "on the 29th December, 1950, to say that the Zanzibar suppliers "have not effected our clients' shipment of cloves and our clients' "contract with them must be considered as cancelled." Thereafter the appellants paid compensation to the two firms. Through what was called the respondents' arbitration it was agreed that the sum to be paid by the appellants to Messrs. Makhanlall in full settlement of their claim should be $28,000. That sum was paid as was likewise a sum of $15,000 to Messrs. Panachand & Co. with whom it was agreed that such sum would be accepted in full settlement.

The appellants brought proceedings against the respondents and by their statement of claim dated April 7, 1951, claimed the sum of $113,820 as damages by reason of the failure of the respondents to give delivery of the cloves referred to in the contract of November 7, 1950. The sum claimed was the difference between the market price (in December, 1950, and January, 1951) which was said to be $230 per picul, and the purchase price. The effective paragraph in the defence of the respondents, delivered on June 28, 1951, was in these terms: "Defendant "states that the contract was made subject to force majeure and "shipment and that no shipment of the goods contracted to be "sold took place." When the action came on for trial in October, 1955, the appellants were given liberty to amend their statement of claim and the trial was adjourned. The appellants added to their statement of claim by pleading their contracts of sub-sale with Messrs. Makhanlall and Messrs. Panachand and the settlements they had effected, and claimed the amounts paid under those settlements together with the amounts of costs they had paid and also their loss of profit, all by way of special damages.

The appellants limited their claim to the sum of $48,280, being the amount of the special damage shown in the amended statement of claim. The claim for damages on the basis of the difference between the contract price and the market price remained—but the amount of such claim was limited to $48,280.

The trial judge dismissed the appellants' claim, and his decision was affirmed by the Court of Appeal by a majority.

1960. Feb. 8, 9, 10, 12. *B. J. M. MacKenna Q.C.* and *Michael Mann* for the appellants. The main point turns on the construction of the contract of November 7, 1950, and in particular on the effect of the words "subject to shipment," the respondents' case being that they are protected by those words. There are conflicting views about the effect of those words in an instrument which, as here, purports to be a forward contract of sale. By one view—the "Singapore alternative"—which has found favour with the majority of the judges below, the words have been given a very drastic effect; it is said that by their inclusion the instrument never acquired the character of a bilateral contract.

The view against which the appellants are contending is that the sellers retain complete freedom either to ship or not to ship, and that if they choose not to ship no one can complain; if they chose to ship they may still remain free of any obligation to the other party if at the time of shipment they are party to definite contracts which do impose an obligation; they can at any time elect to make shipped goods available at any time to satisfy their obligations under the definite contracts, and if they do, then in their view they remain free of any obligation to the appellants, who cannot complain. On this view it is not, it is submitted, a contract at all; it confers an option on the sellers; they do not, on this view, exercise that option so as to submit themselves to any obligation to the appellants unless at least two things occur: (1) they choose to ship goods; (2) at the time of shipment they are not party to any definite contract of sale for whose fulfilment the shipment may be required.

There are two alternative views, either of which could be fatal to the respondents: (1) The instrument is what it purports to be, a bilateral contract which imposes obligations on both parties. It imposes two obligations on the sellers, one unconditional and the other conditional. The unconditional obligation is to use reasonable diligence to ship goods of the kind and quantity required by the contract. The second obligation is conditional upon their succeeding in shipping such goods; if they do, then they are bound to deliver them to the buyers, subject, of course, to any other exceptions in the instrument, such as force majeure. Finally, on this view, the burden is on the sellers of proving that they used reasonable diligence. On this view the sellers are worse off in two respects, (1) they must acquire and ship goods, (2) if they succeed, they cannot invoke the existence of other contracts to excuse their failure to supply.

The other alternative view which would be fatal to the respondents is that they must be reasonably diligent to ship goods of the quantity required by this and any other contract which they may have, and if on using such diligence they fail to ship enough goods, then they must give the buyers their proportionate share. There, too, the burden would be on the sellers to prove that they had used such diligence.

The sellers have not attempted to prove that they used their best endeavours to obtain a shipment to meet all their commitments, and on the documents it appears that they could not have succeeded if they had tried. The case raises no question of force majeure, but, on force majeure, see *Lebeaupin* v. *Richard Crispin & Co.*[1]

There are three English cases in which the words " subject " to shipment " have occurred in the documents: *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.*[2]; underlying the judgment in that case is the view that a seller who enters into a contract " subject to shipment " does not thereby obtain for himself an unlimited option either to ship or not to ship; either to make contracts with suppliers or not as he thinks fit; the Court of Appeal were surely holding that there was an obligation on the seller to make a firm contract with a supplier, the words " subject " to shipment " no doubt excusing the seller in the event of the supplier failing to perform his obligation. In the present case the sellers did enter into a firm contract to make shipment in December. The second case is *Gray* v. *Slater, Birds & Co.*,[3] on which precisely the same point is made; the basis on which that case proceeds is that the words " subject to shipment " are inserted in the contract not for the purpose of giving an unlimited option, but to protect the seller against default of some person who is making arrangements to get the goods on the ship. In the third case, *Hollis Bros. & Co. Ltd.* v. *White Sea Timber*

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[1] [1920] 2 K.B. 714; 36 T.L.R. 739.

[2] (1923) 17 Ll.L.Rep. 7 (C.A.).

[3] (1924) 19 Ll.L.Rep. 59.

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Trust Ltd.,[4] which was much relied on by the majority judges below, Porter J. is saying that the words " subject to shipment " in his view do give an option to the seller to ship or not as he chooses; but the judge goes on to say that if the seller does in fact ship, then he must deliver to the buyer; but again he does qualify that by saying, at any rate if they have not been shipped in fulfilment of other contracts, reserving that matter for further consideration. That means, it is submitted, that if the goods have not been shipped in fulfilment of other contracts, then there is an obligation to deliver them to the buyer. One cannot extract from that dictum of Porter J. a rule that, in the class of case where there are other contracts, there is no obligation to deliver the goods to the buyer.

The view of Porter J. introduces a further alternative, that is, there is freedom to ship goods of the contract description and quantity, but if the seller does ship them, he must deliver them to the buyer unless prevented by force majeure. On this view the fact that he had other contracts and that he wishes to allocate goods to those other contracts is not force majeure and does not provide him with any excuse. Porter J. appears to have misunderstood *Barnett* v. *Javeri & Co.*[5] Even if he was right in saying that the contract gives a complete option to the seller, it is an option which, as it were, is exercised here when he has 50 tons of cloves on board the ship; " subject to shipment " means subject to shipment of any parcel of cloves of the right quantity and description. It does not mean subject to shipment of the amount of cloves necessary to satisfy this contract and any other contracts.

With regard to damages; the appellants are not entitled to recover anything over and above the difference between the contract price and the market price, if, indeed, a market price of cloves of the December shipment can be ascertained. The terms of the settlements which the appellants made with the purchasers from them are, in the particular circumstances of this case, a reasonable guide of what was the market price—after five or six years had elapsed no better guide was likely to be found. The inferences to be drawn from those figures are not unduly in favour of the appellants. The respondents say that they repudiated their contract and that the appellants accepted the repudiation. But the date for fixing damages in the case of a repudiated contract is the date for performance of the contract: *Millett* v. *Van*

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[4] [1936] 3 All E.R. 895.

[5] [1916] 2 K.B. 390.

Heek & Co.[6]; that case also establishes that the party liable to pay damages according to the price on that date may be able to persuade the court that the party who has accepted his repudiation acted unreasonably in not making some forward purchase. That point cannot assist the respondents, because it was not proved that there was any unreasonable failure by the appellants to make a forward purchase on or after January 20, 1951, when the *Ettrick Bank* arrived.

The cases on "subject to licence" are all one way: *Charles H. Windschuegl Ltd.* v. *Alexander Pickering & Co. Ltd.*[7]—all that was said there is adopted in relation to the present contract; *Brauer & Co.* (*Great Britain*) *Ltd.* v. *James Clark* (*Brush Materials*) *Ltd.*[8] So here, "subject to shipment" is a special exemption clause in favour of the sellers, and they must show that notwithstanding all reasonable steps taken by them they could not control shipment. *Dampskibsselskabet Danmark* v. *Poulsen*[9] is cited for the help it gives by way of analogy.

C. P. Harvey Q.C. and *John Donaldson* for the respondents. This case started nine years ago, and yesterday for the first time it was suggested that a major question was whether it had been proved that the respondents had used their best endeavours or had exercised due diligence in trying to secure the shipment of cloves which they had contracted to sell. That is something on which there is no evidence, for it has never until yesterday been at issue, and this is exactly one of those cases where the Board should not permit a new point of this sort to be raised which might quite easily have been dealt with below; the scope of the rule is very wide: *North Staffordshire Railway Co.* v. *Edge*[10]; *Wilson* v. *United Counties Bank Ltd.*[11]; *Perkowski* v. *Wellington Corporation*[12]; *Connecticut Fire Insurance Co.* v. *Kavanagh.*[13] Further, it cannot be assumed that the respondents did not use their best endeavours in this matter, and there is some reason for assuming that they probably did. Rigby J. in his judgment in the Court of Appeal was right in saying that "the appellants' "contention throughout has been, and is, that the only effect of "those words was to give an option to the respondents, as sellers, "as to whether or not to ship, but once they did, in fact, ship

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[6] [1921] 2 K.B. 369 (C.A.); 37 T.L.R. 411.

[7] (1950) 84 Ll.L.Rep. 89.

[8] [1952] W.N. 422; [1952] 2 All E.R. 497; [1952] 2 T.L.R. 349.

[9] 1913 S.C. 1043.

[10] [1920] A.C. 254, 263; 36 T.L.R. 115 (H.L.).

[11] [1920] A.C. 102, 106 (H.L.).

[12] [1959] A.C. 53, 69; [1958] 3 W.L.R. 564; [1958] 3 All E.R. 368.

[13] [1892] A.C. 473, 480; 8 T.L.R. 752.

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"50 tons of Zanzibar cloves, second grade, then the appellants, "as buyers, were entitled to have those 50 tons appropriated to "them in fulfilment of their contract, irrespective of any other "similar and concurrent contracts, whether conditional or unconditional, that the respondents might have with other parties. ". . ." That had been their contention throughout; it was the issue on which the case was fought and on which the Board gave leave to appeal.

Proceeding, therefore, to consider the contract on the basis that has been put forward hitherto, no property "passed" until the goods were appropriated by the sellers in the sense in which it is used in the Sale of Goods Act. The appellants say that the respondents are estopped from saying that they did not appropriate these goods to their contract. There is nothing of that sort here—no representation was made by the sellers; they stated, on the contrary, "we have not attributed any goods to the contract; the contract is cancelled." To succeed, the appellants' argument on this point—that these 50 tons on the *Ettrick Bank* were theirs—needs the support of something which they can point to as being an election of the kind which was made in *Gath* v. *Lees* [14] and which was suggested to have been made in *Borrowman, Phillips & Co.* v. *Free and Hollis.*[15] Here, of course, there is absolutely nothing of that sort.

There is no business necessity for implying "subject to the "possibility of shipment" or "subject to the sellers being able "to ship"; the words "subject to shipment" must be taken to mean what they say—nothing more than that.

The matter rests entirely at the will of the seller at the stage of attribution; and that would appear to be the stage which Porter J. was considering in the *Hollis* case.[16] The trial judge and the majority of the Court of Appeal were right in the construction which they adopted. The alternative construction produces a situation in which a seller who has sold, for example, 10 parcels of 50 tons each "subject to shipment" cannot safely ship any goods unless he can ship 500 tons. Such a construction would, it is submitted, be commercially absurd. The object of the term "subject to shipment" is to enable a seller in some circumstances to withhold delivery without breaking his contract. There is nothing extravagant in people entering into contracts of that sort; they must realise that those terms make their contract conditional.

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[14] (1865) 3 H. & C. 558.

[15] (1878) 4 Q.B.D. 500.

[16] [1936] 3 All E.R. 895.

Porter J. was right in the *Hollis* case [16] in saying that he got some assistance from the "arrived" ship cases: see *Lovatt* v. *Hamilton* [17] and *Johnson* v. *Macdonald* [18]; and he did mean and was right in meaning what the trial judge in the present case took him to mean. It cannot be right to attribute to the simple word "shipment" a construction which involves the sellers breaking their contracts, if not with the appellants, with others who are in the same position as the appellants. Read in a particular way, it can be said that *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.*[19] and *Gray* v. *Slater, Birds & Co.*[20] are not easily reconcilable with the view of Porter J. in the *Hollis* case,[21] but in every case the words "subject to shipment" are to be approached in the light of the particular circumstances of the contract. The *Star* [22] and the *Gray* [23] cases are relevant only so far as the appellants' argument is based on the proposition that the sellers undertook not merely to ship but to use due diligence to see that the goods were shipped, but it has already been submitted that on the way in which the case has been presented the Board should not allow that point to be pursued.

Whether it be right or wrong to read "subject to shipment" as "subject to the possibility of shipment" or "subject to the fact "of shipment," which are the two competing views, they do not make any difference to the observations of Porter J. in *Hollis's* case,[24] where he said: "My view is that if they have shipped "the goods the sellers are obliged, at any rate if they have not "been shipped in fulfilment of other contracts, to supply them "under this contract." That passage applies equally to whatever construction is put on "subject to shipment." [Reference was also made to *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[25]] As to the cases relating to export licences; there is no difficulty in distinguishing between export licences and ships.

With regard to damages; it is agreed that the right date for calculating them in the events which happened was about the date when the *Ettrick Bank* arrived—January 20. It is further agreed that the measure of damages is the difference between the $94 per picul given in the contract and whatever the market price was at that date. What is not agreed is that there is any evidence of what that market price was. *The Arpad*[26] is cited by way of analogy and for the observations of Greer L.J. On non-suiting, see *Fox* v. *Star Newspaper Co.*[27]

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[16] [1936] 3 All E.R. 895.
[17] (1839) 5 M. & W. 639.
[18] (1842) 9 M. & W. 600.
[19] 17 Ll.L.Rep. 7.
[20] 19 Ll.L.Rep. 59.
[21] [1936] 3 All E.R. 895.
[22] 17 Ll.L.Rep. 7.
[23] 19 Ll.L.Rep. 59.
[24] [1936] 3 All E.R. 895, 900.
[25] [1917] A.C. 495; 33 T.L.R. 454 (H.L.).

Donaldson following. *Kokusai Kisen Kabushiki Kaisha* v. *Johnson*[28] is very close to the present case—the words there were "subject to stem." In *Graham & Scott (Southgate) Ltd.* v. *Oxlade*[29] there are two expressions, "subject to contract" and "subject to satisfactory survey"; the case shows quite clearly that the "subject to contract" cases are not, but that, on the contrary, the "subject to licence" cases are, in a corner of law by themselves. *Marks* v. *Board*,[30] a "subject to surveyor's "report" case, is further away than the "subject to stem" case. Benjamin on Sale, 8th ed., at pp. 585–590, gives a list of the "arrived" cases; in none of them is there a decision that there is an obligation to take steps to make sure that the ship arrives. They do not support the appellants' contention here. In *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food*[31] McNair J. applied *Tennants's* case.[32] Those cases support the general submission that it is not sufficient for the appellants to say, "well, you had 50 tons, therefore you should "have delivered them to us." The respondents did in fact use those 50 tons to satisfy unconditional contracts.

MacKenna Q.C. in reply. It is irrelevant that the sellers had made other contracts; if, contrary to the appellants' submission, the sellers are entitled to rely on those other contracts, it must be a condition of their right to do so that they tried to ship enough to satisfy their obligations to the appellants as well as to their other buyers, and they have not done so. They should not be allowed to raise that point here. It was for the sellers to plead and prove facts which excused delivery of the goods. The appellants' argument therefore proceeds on the basis of fact that it has not been proved that the sellers did all that they could. The *North Staffordshire Railway* case[33] is not really against the appellants here. The *Star*[34] and the *Gray*[35] cases were not brought to the attention of the court below. If the Board do consider this point—the relevancy of the other contracts—the

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[26] [1934] P. 189, 218; 50 T.L.R. 505 (C.A.).

[27] [1898] 1 Q.B. 636; 14 T.L.R. 280 (C.A.).

[28] (1921) 8 Ll.L.Rep. 434.

[29] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856 (C.A.).

[30] (1930) 46 T.L.R. 424.

[31] [1960] 1 Q.B. 439; [1959] 3 W.L.R. 665, 703; [1959] 3 All E.R. 434.

[32] [1917] A.C. 495.

[33] [1920] A.C. 254.

[34] 17 Ll.L.Rep. 7.

[35] 19 Ll.L.Rep. 59.

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words "subject to shipment" should not be qualified in any other way than any other exceptions inserted in a contract for the seller's benefit would be qualified; all such exceptions are to be subject to the qualifying condition that the seller should perform his obligations under the contract. [*Hale* v. *Rawson*[36] was referred to.]

The submission for the respondents on attribution finds no support in anything that was said by Porter J. in the *Hollis* case.[37] *Tennants's* case[38] does not touch the contention that where there is a provision "subject to shipment" the seller is obliged to make an effort to ship; it also does not touch the point as to attribution. The *Oxlade* case[39] is distinguishable. The respondents were obliged to deliver 50 tons of cloves to the appellants if that quantity or more were shipped during December consigned to the respondents in Singapore.

The Acting Chief Justice's course in regard to damages was the reasonable one, and it is impossible to say that it is not the right solution.

April 4. The judgment of their Lordships was delivered by Lord Morris of Borth-y-Gest, who stated the facts set out above and continued: Apart from questions relating to damages the issue in the action was that which was raised in the paragraph in the defence set out above. The respondents relied upon the words "subject to force majeure and shipment": they claimed that no shipment of the goods contracted to be sold took place.

In order that the reasoning of the judgments under review may be understood it is necessary to make brief reference to certain other arrangements made and other commitments entered into by the respondents. As will be seen, however, these were of no concern to the appellants.

In November, 1950, the respondents entered into contracts (some 16 in number) to sell to various buyers various quantities of cloves, which in total amounted to approximately 760 tons. Such cloves were all to be of November shipments. On various dates (mostly in November, 1950) the respondents entered into contracts (some 13 in number) to sell various quantities of cloves, amounting in total to 375 tons, which were to be of December shipments. In November, 1950, the respondents entered into three contracts (being two in addition to the contract with the appellants now being considered) to sell Zanzibar cloves December shipment. In total these three contracts amounted to 125 tons. There were various differences in regard to the conditions which appeared in the various contracts.

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[36] (1858) 4 C.B.N.S. 85.

[37] [1936] 3 All E.R. 895.

[38] [1917] A.C. 495.

[39] [1950] 2 K.B. 257.

After the respondents became aware that 300 tons were to arrive on the *Tjibadak* and 50 tons on the *Ettrick Bank* they consulted their solicitors as to what they should do. In the result, as was stated in his judgment by Tan Ah Tah J., the whole of the 300 tons carried on the *Tjibadak* were delivered to the buyers who were expecting the November shipments. As the total quantity to be delivered to these buyers was approximately 760 tons the respondents had to pay compensation for short delivery. As to this, Mr. Jumabhoy, in his evidence, said that in regard to the "November contracted goods" there were deliveries to the respective buyers proportionately. He said: "I did not take any "profit by selling cloves at the market price which was then very "high. I delivered the goods to buyers at contract price." Of the 50 tons carried on the *Ettrick Bank* four tons were delivered to buyers of November shipments while the remaining 46 tons were delivered to buyers of the December shipments which totalled 375 tons, in part performance of the contracts of sale. There was, therefore, a balance of 329 tons due to be delivered to such buyers. The trial judge held that in order to satisfy the claims of these buyers the respondents either had to buy cloves in Singapore for delivery to them or had to pay them compensation.

The trial judge held that the respondents were protected from liability by reason of the operation of the words of the contract. He based himself largely upon the judgment of Porter J. in *Hollis Bros. & Co. Ltd.* v. *White Sea Timber Trust Ltd.*[1] In that case the parties had entered into a contract for the sale of parquet blocks c.i.f. for shipment from a port in the Arctic Circle which was only open to shipping for about one month in the year. In respect of one parcel of the blocks there was an undershipment of blocks of a particular size. There was a clause in the contract which provided: "In the event of undershipment of any item "buyers are to accept or pay for the quantity shipped, but have "the right to claim compensation for such short shipment." There was also a clause which read: "This contract is subject "to sellers making necessary chartering arrangements for the "expedition and sold subject to shipment any goods not shipped "to be cancelled." An arbitrators' award in favour of buyers was subject to the opinion of the court on the question whether the buyer's right to claim compensation for short shipment was negatived by the words "sold subject to shipment any goods not "shipped to be cancelled." In the context of that case, Porter J. rejected the view that those words could be given the meaning that the sale was subject to the ability of the sellers to ship, and that there was cancellation of any goods in respect of which there was inability to ship. He held [2] that the words "subject to ship- "ment" meant "provided the sellers in fact ship," and that there was an option in the sellers to ship or not to ship. He held, however, that if the goods were shipped they had to be attributed to the contract, and that the sellers could not treat them as free goods unattributed to any contract. He said [3]: "My view is that "if they have shipped the goods the sellers are obliged, at any "rate if they have not been shipped in fulfilment of other "contracts, to supply them under this contract."

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[1] [1936] 3 All E.R. 895.

Basing himself upon this case the trial judge considered that the 300 tons of cloves carried on the *Tjibadak* and the 50 tons carried on the *Ettrick Bank* were shipped in fulfilment of definite contracts which had been entered into by the respondents and which were subject to no condition as to shipment. He held that the respondents were under no obligation to supply the cloves to the appellants.

One question raised in this appeal is whether, apart from questions of construction, it is correct on the facts to say that the 50 tons were shipped in fulfilment of definite contracts.

In the Court of Appeal Wee Chong Jin J. agreed with the judgment of the trial judge. Rigby J. was also in agreement. He considered that the trial judge was justified in holding that the total quantity of 350 tons carried on the two vessels was clearly shipped in fulfilment of definite contracts which contained no condition as to shipment. Rigby J. was further of the opinion that the presence of the words "subject to shipment" had the result that there was no more than an executory and unenforceable agreement which would only be converted into a valid contract of sale between the parties by the seller exercising his option to ship coupled with some evidence, direct or circumstantial, that the goods shipped were intended to be appropriated to that contract. Knight Ag.C.J. was of the contrary opinion. He said: "As I see it, the appellants are right and the words "'subject to shipment' must be strictly construed and can only

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[2] [1936] 3 All E.R. 895, 899.

[3] Ibid. 900.

" mean 'subject to shipment of 50 tons in December'—which " shipment was in fact made to the respondents." He also said: " If the respondents wished to cover themselves against a failure " to obtain the cloves in Zanzibar why did they not say in the " contract 'subject to shipment of 350 tons'—or whatever " numbers of tons it was that they required to fulfil *all* their " undertakings? Again, if the respondents meant to contract " with the appellants only if they obtained the cloves and gave no " undertaking that they would obtain them—surely this too could " have been very simply embodied in the contract? "

Mr. MacKenna, for the appellants, submitted that the phrase " subject to shipment " contemplated a failure to ship which was beyond the control of the respondents and which might occur despite the exercise of reasonable diligence to effect shipment. He submitted that it was for the respondents, if they sought the protection of the contractual clause, to establish that they had used reasonable diligence, which, he submitted, they had failed to establish. In reliance upon his submission that the contractual clause did more than to give the respondents an option whether to ship any goods or not, he referred to *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.*[4] and *Gray* v. *Slater, Birds & Co.*,[5] and to cases where contracts were made subject to import or export licences being obtained. Counsel for the respondents referred to authorities such as *Kokusai Kisen Kabushiki Kaisha* v. *Johnson*.[6] In that case there was a charter which had the words " This " charter is concluded subject to stem, same to be confirmed in " London not later than Monday, the 7th instant." In the circumstances of that case Rowlatt J. held that it would be improper for him to read in a qualification that the words should only take effect if it could be shown that the charterers had taken all due measures to try to arrange a stem.

Their Lordships were also referred to various authorities relating to the construction of phrases bearing some measure of resemblance to that now under consideration: but cases which relate to the construction of other words in other contexts do not yield effective guidance. It must furthermore be borne in mind that the clause now under consideration is not " subject to shipment " but " subject to force majeure and shipment." There is, therefore, a double-barrelled condition in which there is a juxtaposition of " force majeure " and of " shipment." Having regard to this consideration their Lordships think that the clause in the contract should be construed as meaning that the contract was (a) conditional upon the sellers not being prevented by circumstances amounting to force majeure from carrying it out, and (b) conditional upon the sellers being able to procure the shipment in December, 1950, of cloves to the quantity and of the description referred to in the contract. So far as the clause deals with force majeure it appears to be designed to protect the respondents from liability in the event of their being prevented from performing the contract by circumstances beyond their control. It seems to their Lordships to be in consonance with this to construe the second branch of the condition as being designed to protect them from liability in the event of their being prevented from carrying out the contract through inability to procure the shipment. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendor, then there would be no contractual force in the document, which would merely give an option to the vendor. There may be cases where words in a contract will in certain events provide an excuse for a vendor who fails to deliver. Thus, in *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[7] there was a condition in the contract which provided that "deliveries may be suspended "pending any contingencies beyond the control of the sellers or "buyers (such as . . . war . . .) causing a short supply of "labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the "article." So in *Pool Shipping Co. Ltd.* v. *London Coal Co. of Gibraltar Ltd.*[8] there was an exceptions clause in wide terms under which the court felt entitled to look beyond the buyer and seller, and to consider the sellers' commitments under contracts with other buyers. There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments.

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[4] (1923) 17 Ll.L.Rep. 7.
[5] (1924) 19 Ll.L.Rep. 59.
[6] (1921) 8 Ll.L.Rep. 434.

The construction of the clause set out above seems to their Lordships to produce a more reasonable result than other suggested constructions. It would be strange if the clause had to be construed as making the contract conditional upon (a) the sellers not being prevented by force majeure from carrying it out, and (b) the sellers choosing to ship the cloves which they were to be free to do or not to do at their own will and pleasure. It would be additionally strange if, following upon the provision against the consequences of force majeure in its first branch, the second branch of the condition went on to make the contract conditional on the sellers choosing to ship the cloves, and thinking fit to allocate them to the contract which they were to be under no obligation to do. It seems unlikely that a clause would be framed to provide that force majeure was to excuse a contracting party from doing that which he was under no obligation to do. In the courts below the appellants appear to have relied mainly upon a submission that even if the respondents were free to ship or not to ship as they chose they became contractually bound if they did in fact ship. The respondents, on the other hand, argued that the contract was only binding in the double event of the sellers in fact shipping cloves and allocating a sufficiency of the cloves shipped to this particular contract. The undisputed facts show that the respondents were able to ship and did in fact in December, 1950, ship cloves to the quantity and of the description set out in the contract of November 7, 1950. The shipment by the respondents of 50 tons shows that shipment of the goods contracted to be supplied was not prevented by circumstances beyond their control. The condition, as their Lordships think it should be construed, was therefore satisfied. Stated otherwise the respondents did not bring themselves within the excusing provision of the clause. It follows that when the respondents failed to deliver to the appellants the cloves contracted for and when they purported to cancel the contract they committed a breach of contract for which they became liable in damages to the appellants.

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[7] [1917] A.C. 495; 33 T.L.R. 454 (H.L.).

[8] [1939] 2 All E.R. 432.

It was strongly submitted by Mr. Harvey that the submissions made by the appellants in the courts below did not include any submission covering the construction referred to above. While this appears to be the case, their Lordships cannot regard themselves as being restricted or circumscribed in regard to a question as to the proper construction of the clause in question. There would have been more force in the objection if a new point not taken below was one which could have been met by further evidence, e.g., if there had been no shipment and if it were alleged that the sellers had not taken all the steps which were reasonably open to them to procure the shipment. Inasmuch, however, as the respondents by shipping 50 tons had themselves shown that they were able to ship 50 tons, no new issue of fact was involved. Their Lordships are clearly of the opinion that the respondents cannot be allowed to excuse their non-performance by reference to their other commitments, or to seek to give those other commitments priority over the appellants' claim. The contract of November 7 contains no reference to other contracts or to other commitments. Such other commitments were of no concern to the appellants. The contract was simply a contract for the sale by the respondents of cloves of the quantity and description set out in the contract, and the respondents failed to fulfil their obligations to the appellants.

Apart from these considerations their Lordships find it difficult to see how it can be said that the 50 tons were " shipped in fulfil- " ment of other contracts." If it is asked: " Which contract or " contracts? " no satisfactory answer can be given and none was given. The respondents urged that the words " subject to ship- " ment " meant " subject to our in fact shipping enough to satisfy " our commitments " or " subject to our shipping enough to " satisfy all contracts that we will have made up to the date of " arrival of the last ship of December shipments." In their Lordships' view it would be quite unreasonable and would be an unwarranted straining of interpretation to place any such meaning upon the words now being examined. To arrive at any such interpretation a drastic series of additions to the words used would be necessary.

It is further to be observed that there are no additional words of limitation such as " subject to shipment of 50 tons which we, " at the time of shipping, appropriate to you." Doubtless no such words were used for the reason that in view of the nature of the respondents' business and operations there would be no question of their appropriating or earmarking any particular cloves to any particular contract at the time of shipment. The respondents were importers and stockists and their necessity was to secure that they arranged for sufficient goods to be shipped to themselves in Singapore, so that they could then meet all their obligations in Singapore. It is manifest that the respondents did not ship the quantities that they needed. But when they shipped they were merely shipping goods to themselves as merchants and importers, and so far as they are concerned they had not arranged the particular ways in which they would deal with the cloves after the cloves had arrived in Singapore. The evidence shows that there was no allocation or attribution to any particular client of theirs. According to the evidence, what the respondents did was to go to their solicitors to take advice as to what they should do by way of allocating the tonnage available for them having regard to the arrangements that they had made. But those arrangements were no concern of the appellants, and there was no stipulation in the contract in regard to any other contracts.

For the reasons stated their Lordships consider that on the undisputed facts the respondents were without excuse when they failed to deliver to the appellants. On this basis there was agreement between the parties during the hearing before their Lordships' Board that the correct measure of the appellants' damages was the difference between the contract price and the market price at or about the date when the *Ettrick Bank* arrived in Singapore. The difference between the parties was as to whether the amount of such damages could be ascertained and had been satisfactorily proved by the available evidence. It had been stated in the Court of Appeal that if an order were made directing the trial judge to reopen the proceedings and to assess the damages payable, no evidence could, after the intervening lapse of time, be called to establish what was the market price of cloves in January, 1951.

The problem was therefore one of proof. In the Court of Appeal, Knight Ag.C.J. held that the evidence was sufficient to establish that the appellants were entitled to recover the sum of $46,783.80 damages. Wee Chong Jin J. concurred in this view. The reasoning of Knight Ag.C.J. was that evidence as to the market price at the relevant time could sufficiently and satisfactorily be found in the facts and circumstances relating to the settlements effected by the appellants with Messrs. Makhanlall & Co. and with Messrs. Panachand & Co. The contract price between the appellants and these firms was $99 per picul. The sum paid after a negotiated settlement with Messrs. Makhanlall was $28,000. The respondents took a part in negotiating and bringing about that settlement. It seems a reasonable inference as a matter of business common sense that the sum of $28,000 would certainly not be more than but would probably be less than the sum resulting from taking the contract price of $99 and the market price at the date when Messrs. Makhanlall should have received their cloves. In their Lordships' view this is very reasonable. But by way of answer to or criticism of this it was pointed out that the settlement made with Messrs. Panachand & Co. only involved a payment of $15,000. Both settlements, which incidentally were effected within a few days of each other in August, 1951, related to contracts for the same quantities and having the same figures of purchase price and the same times of delivery. It could not, therefore, be that both figures, since they differed, were direct calculations based upon the market price. This criticism does not, however, diminish the force of the inference that no settlement would have been negotiated, particularly

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by the respondents, on the basis of paying more than the difference between the contract price and the current or market price at the time of non-delivery. It was common ground that there was at all material times an available market for cloves in Singapore.

It was said that though Mr. Jumabhoy had himself been under the necessity to make local purchases in Singapore in an endeavour to meet his obligations, yet he was not asked questions as to the prices he had had to pay. Though it was agreed that the evidence showed that at the relevant time the price of cloves was rising, it was submitted that the evidence was not adequate to enable the court to arrive at a conclusion as to what was the market price. Though there is some force in the contentions advanced, their Lordships consider, in agreement with the majority of the Court of Appeal, that it was a reasonable inference that the difference between the contract price of $94½ per picul for the appellants' 50 tons and the market price at the time when there should have been delivery was not less than $46,783.80.

For the reasons stated, their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgments of the courts below be set aside and judgment entered for the appellants for the sum of $46,783.80.

The respondents must pay the costs of the appeal and the costs in the courts below.

Solicitors: *Amery-Parkes & Co.; E. F. Turner & Sons.*

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May 11.

DUDLEY ERNEST LYNCOLN WAGER FELIX . . . . APPELLANT;

AND

GENERAL DENTAL COUNCIL . . . RESPONDENTS.

ON APPEAL FROM THE GENERAL DENTAL COUNCIL.

Dentist — Discipline — "Infamous or disgraceful conduct" — Meaning —National Health Service—Allegations of overcharging and wrongful certification — Elements essential to establish "infamous or

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* *Present*: Lord Keith of Avonholm, Lord Jenkins and Lord Morris of Borth-y-Gest.

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"disgraceful conduct in a professional respect"—Dentists Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 28), *ss.* 25, 29.

Privy Council—Fact, question of—Appeal from disciplinary tribunal—Principles applicable—Dentists Act, 1957, *s.* 29.

Privy Council—Jurisdiction—Professional discipline—Whether appeal rehearing—Dentists Act, 1957, *s.* 29.

The appellant, a dentist registered under the Dentists Act, 1957, appealed against a determination of the Disciplinary Committee of the General Dental Council that he had been guilty of infamous or disgraceful conduct in a professional respect in overcharging for, and wrongful certification of, treatment of certain National Health Service patients. While admitting the overcharging, the appellant denied that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled, and attributed the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he entrusted the keeping of his records of treatment without adequate supervision or checking. With respect to the treatment alleged to have been wrongfully certified as necessary, the appellant's evidence was that he honestly believed it to be necessary, and the evidence of dentists called for the respondent council did not claim that that opinion was one which no dentist could honestly hold:—

Held, (1) that the appeal was by way of a rehearing, to which the same principles applied as were applicable to an appeal to the Court of Appeal against the decision of a judge of first instance (post, p. 716).

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370 (H.L.); [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326 considered.

(2) Whether in relation to a given matter a dentist had been guilty of infamous or disgraceful conduct was a question of mixed fact and law, the question of law being whether on the facts proved or admitted he had been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957 (post, p. 717).

(3) The words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect," and to make good such a charge in relation to the keeping of the prescribed dental records it was not enough to show that some mistake had been made through carelessness or inadvertence in (as here) two or three cases out of several hundred patients treated. To make such a charge good there must (generally speaking) be some moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as could be said to amount to dishonesty for that purpose. The question was to some extent one of degree, but the cases of overcharging in the present case clearly fell short of the degree of culpability required (post, pp. 719, 720–721).

Nor could the wrongful certification be regarded as amounting to infamous or disgraceful conduct. In the state of the evidence it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold the opinion that the treatment certified was necessary, and an

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honestly held opinion, even if wrong, plainly could not amount to infamous or disgraceful conduct (post, p. 721).

Allinson v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750; 10 T.L.R. 304 (C.A.) considered.

Determination of the Disciplinary Committee discharged.

This was an appeal (No. 52 of 1959) under section 29 of the Dentists Act, 1957, from a determination of the Disciplinary Committee of the General Dental Council, made on November 12, 1959, under sections 25 and 26 of the same Act, that the appellant had been guilty of infamous or disgraceful conduct in a professional respect and that his name be erased from the register.

The appellant was a native of Sierra Leone and received his early education there. He was and had been at all material times a dentist registered under the Dentists Act, 1957, and his name was and had been at all material times included in the Bristol National Health Service list. He was 29 years of age, and having qualified as a licentiate in dental surgery at Glasgow in 1955 began practising on his own account in August, 1957.

The determination under appeal was the outcome of an inquiry held by the Disciplinary Committee on November 11 and 12, 1959, with respect to the following charge against the appellant:

" That being a registered dentist:

" (1) Having accepted Miss Ann Mathews of 623, Portway, " Shirehampton, Bristol, in or about February, 1958, as a patient " under the National Health Service (General Dental Services) " Regulations, you wrongfully claimed fees for three fillings " which had not been done.

" (2) Having accepted Mrs. Alkmina Moger of 2, Hallards " Close, Lawrence Weston Bristol, in or about April, 1958, as " a patient under the terms of the said Regulations, you " wrongfully claimed fees for two fillings when only one filling " had been done.

" (3) Having accepted Mrs. Beryl Dennis of ' Appletreewick,' " Barracks Lane, Shirehampton, Bristol, in or about April, 1958, " as a patient under the terms of the said Regulations: (i) you " wrongfully certified on Form E.C.17 that sixteen fillings were " required to render the patient dentally fit, when in fact thirteen " of these fillings were unnecessary: (ii) you wrongfully claimed " fees for four fillings when only three fillings had been done.

" And that in relation to the facts alleged you have been " guilty of infamous or disgraceful conduct in a professional " respect."

In the course of the inquiry paragraph (2) of the charge was amended by the insertion of the words " in one tooth " between the words " two fillings " and " when only. . . ."

At the conclusion of the inquiry the Disciplinary Committee determined (*a*) that the facts alleged against the appellant in each paragraph of the charge had been proved; (*b*) that as regards paragraph (1) (Miss Mathews) and paragraph (3) (i) and (ii) (Mrs. Dennis) the appellant had, in relation to the facts proved, been guilty of infamous or disgraceful conduct in a professional respect; but (*c*) that as regards paragraph (2) of the charge (Mrs. Moger) the appellant had not, in relation to the facts proved, been guilty of such conduct; and on those findings the Disciplinary Committee directed that the name of the appellant should be erased from the Register.

1960. April 4, 5. *Norman Richards Q.C. and Norman Brodrick* for the appellant. This is the first appeal under the Dentists Act, 1957, to come before the Board. The appeal is, it is submitted, by way of a rehearing; section 29 of the Act of 1957, which gives the right of appeal, is in the widest possible terms—the appeal is in no way limited: see, in this connection, *Stock* v. *Central Midwives Board,*[1] *Allender* v. *Council of the Royal College of Veterinary Surgeons*[2] and *Benmax* v. *Austin Motor Co. Ltd.*[3] On those authorities the Board should rehear this case.

With regard to the charges against the appellant, this is not a case where it was alleged at any stage that there was any element of fraud or deceit, and the facts were not in that category which connotes moral turpitude. The appellant's explanation in respect of the admitted overcharging was that it was due to his own carelessness and to the inefficiency of his nurse-secretary; and in respect of the wrongful certification, that in his opinion the additional 13 teeth would require treatment. The word used in the charge was " wrongfully "; it was not " with intent to defraud " or deceive " or even " recklessly." " Wrongfully " must in this context lead to a conclusion of, and must be tied up with, infamous or disgraceful conduct. As to the standard of proof in such a case, see *Bhandari* v. *Advocates Committee,*[4] and as to the requirements of natural justice, *University of Ceylon* v.

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[1] [1915] 3 K.B. 756; 31 T.L.R. 436.

[2] [1951] 2 T.L.R. 872; [1951] 2 All E.R. 859.

[3] [1955] A.C. 370 (H.L.); [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

[4] [1956] 1 W.L.R. 1442 (P.C.); [1956] 3 All E.R. 742.

Fernando.[5] The classical definition of infamous or disgraceful conduct in these matters appears in *Allinson* v. *General Council of Medical Education and Registration*,[6] and in the present case, in respect of the overcharging, the facts established by the evidence do not amount to infamous or disgraceful conduct. The appellant alone gave evidence on this branch of the charge, and there was no evidence in any way rebutting his explanation. With regard to the wrongful certification, section 25 (2) (*c*) of the Act of 1957 provides: " A person's name shall not be erased " under this section . . . on account of his adopting or refraining " from adopting any particular theory of dentistry." While other dentists gave evidence that the work in question was not required, there was no evidence to say that the appellant could not honestly hold the opinion which he expressed.

Summarising: (1) The word " wrongfully " in the context of the charge must have an element of deliberation with or without dishonest intent or a degree of recklessness, and is not synonymous with " incorrectly " or " negligently." (2) At no time whatsoever was it contended that the appellant had been fraudulent, or knew that the claims were false when he submitted them, or that he had acted otherwise than in good faith. (3) By reason of the matters contained in (1) and (2) (supra) the facts admitted and/or found, or which should have been found by the Disciplinary Committee are not, as a matter of law, capable of amounting to " infamous or disgraceful conduct in a professional respect," or alternatively do not, as a matter of fact, amount to such infamous or disgraceful conduct. (4) Even if the Disciplinary Committee found, and were entitled to find, that the facts alleged in paragraph 3 (i) of the charge had been proved and that the appellant was in relation thereto guilty of infamous or disgraceful conduct in a professional respect, the Disciplinary Committee was not thereby entitled as a matter of law to order the erasure of the appellant's name from the register. (5) The Disciplinary Committee were, or alternatively it appeared that they were, influenced in the determination of the matter by the circumstances in which the appellant dismissed his receptionist when the errors were brought to his notice. (6) The gravamen of the case does not warrant the extreme penalty imposed, and their finding and/or direction should be reversed.

J. P. Widgery Q.C. and *Peter Boydell* for the respondents. It is accepted that, on an appeal under the Act of 1957, the

[5] [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631 (P.C.).

[6] [1894] 1 Q.B. 750; 10 T.L.R. 304 (C.A.).

powers of Her Majesty in Council are certainly not less than those enjoyed by the Court of Appeal on an appeal from a decision at first instance in the High Court; it is not disputed that this is a rehearing in the sense contended for by the appellant.

In the submission of the respondents it is of great importance to the profession as a whole that the administration of the National Health Service work is done not only with a very high standard of integrity but also with a very high sense of responsibility. The importance of this matter is made none the less by reason of the fact that a dentist who fails to observe those high standards has a relatively high prospect of not being discovered. The doing of unnecessary work is an offence not merely against the Ministry, who pay the bill, but is also a serious offence against the patient. It is submitted that overcharging, to take that aspect first, may be infamous or disgraceful conduct in a professional respect without proof of an actual intention to defraud. It is not contended that an isolated careless mistake should come within the range of professional misconduct at all; equally it is not necessary to go so far as to prove fraud before an element of infamous or disgraceful conduct is imported; an element of recklessness or complete irresponsibility in regard to these matters would equally amount to infamous or disgraceful conduct, leaving it open to the Disciplinary Committee to consider what the penalty should be. The actual point at which culpability becomes infamous or disgraceful conduct is primarily a matter for the Committee themselves.

It is enough to prove that there was an overcharge. There may be a shifting of the burden of proof when the facts needing to be established are peculiarly within the knowledge of the defendant and not, on the face of it, within the knowledge of the prosecutor: *Rex* v. *Cohen* [7]; the principle in that case should be applied here.

[Lord Jenkins. Your theory rather does put a dentist in peril; you just prove the mistake and invite him to justify it.]

That is the only way in which a great many professional tribunals can work. The alternative is for the solicitor putting forward the case to try to lead positive evidence of recklessness, but if the fact of an overcharge is proved, there is really no more that can positively be proved in these cases by those representing the council. In the circumstances of this case the committee were entitled to find the appellant guilty, even if fraud were an essential, which it is submitted it is not. There is overwhelming evidence of a reckless irresponsibility and a complete disregard of his obligations under the National Health Service.

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[7] [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203 (C.C.A.).

The most serious of the charges was that relating to the unnecessary work—the 13 additional fillings. There is ample material on which the committee could take the view, first, that the appellant intended to do that additional work, and, secondly, that the work was not necessary. The culpability of the appellant would depend, no doubt, on whether there was a genuine difference of professional opinion or whether the work to a dentist was so obviously unnecessary that no qualified dentist could honestly say that it was necessary. The committee were in a position to judge; it was essentially a matter on which a technical body would be able to use its technical experience. If the committee took the view that no competent dentist could honestly have formed a view that this work ought to be done, then they were perfectly entitled to take a very serious view of the appellant's action in regard to it. Admittedly the other dentists who gave evidence were not prepared to go so far as to say that the work was completely unnecessary. The general practice of the committee in these cases would not be to impose a sentence of erasure for three offences of overcharging, but if the committee were satisfied that these additional fillings were going to be done with no justification whatever in circumstances in which a competent and honest dentist would not consider that they ought to be done, there is there an offence proved which in every way justifies the penalty which has been imposed in this case.

Richards Q.C. in reply. If the appellant's explanation of the overcharging is right, as it clearly may be, it could not amount to infamous or disgraceful conduct. So far as the over-certification is concerned, the explanation he gives, and which he has stuck to from the start, establishes his bona fides in this regard, although his views may not have coincided with good dental practice. On the whole of this case the appellant was not in any regard guilty of infamous or disgraceful conduct.

May 11. The judgment of their Lordships was delivered by Lord Jenkins, who stated the facts set out above and continued: To make the details of the charge intelligible, it is necessary to refer briefly to two forms on which a dentist on the National Health Service list is required to record with respect to each patient the treatment needed in order to make the patient dentally fit, and the work actually done. These forms are prescribed by the National Health Service (General Dental Services) Regulations, 1954 (S.I. 1954, No. 472). Under paragraph 5 in Part I of the First Schedule to these Regulations a dentist is required to keep a dental record in respect of each patient, in which he records the treatment given and the date or dates on which it is given. He is also required to keep in respect of each patient the dental estimate form (E.C.17) as to which instructions are given in paragraph 7 of the same part of the same Schedule. This form is somewhat complicated. For the present purpose it is enough to say that a new patient should be required to sign part 10 signifying his or her willingness to undergo treatment, the dentist being then required to examine the patient and record the condition of the teeth on a chart (Part 1 of the form) and also to set out in column 1 of Part 2 the whole of the treatment in his opinion required to make the patient dentally fit, and if the patient is not willing to undergo the whole of such treatment to set out in column 2 of Part 2 particulars of such part of that treatment as the patient is willing to undergo. The dentist should also insert in column 1 of Part 2 his charges for the treatment proposed in accordance with a prescribed scale. Then (subject to approval of the estimate by higher authority when required by the Regulations, which did not require it in the cases now under review) the dentist proceeds to do (as the case may be) the whole of the work specified in column 1 of Part 2, or so much of that work as is specified in column 2. On completion of the work the dentist certifies such completion in Part 7 of the form, specifying the amount claimed for it, and the patient certifies in Part 11 that to the best of his or her belief the work has been done. Finally the completed form is submitted by the dentist for payment, and its accuracy is obviously of great importance.

The appellant admits that he accepted the three ladies named in the charge as his patients under the terms of the National Health Service (General Dental Services) Regulations, 1954, as alleged in the charge, and that in the case of Miss Mathews (whose treatment began on February 28, 1958) he submitted form E.C.17 claiming fees for 16 fillings when only 13 had been done; and that in the case of Mrs. Dennis (whose treatment began on April 15, 1958) he submitted form E.C.17 claiming fees for four fillings when only three had been done; and that in the case of Mrs. Moger (whose treatment began on or about April 21, 1958) he submitted form E.C.17 claiming fees for two fillings when apparently only one had been done. But in the case of Mrs.

Moger (as appears from the amendment to paragraph (2) of the charge) the claim was made in respect of two fillings in one tooth, and the appellant explained in his evidence at the inquiry that the treatment in this instance began with two cavities, which merged into one in the course of the appellant's operations, and that the need for a corresponding alteration in form E.C.17 was overlooked. It would seem that the Disciplinary Committee accepted this explanation as affording sufficient ground for acquitting the appellant of infamous or disgraceful conduct in the case of Mrs. Moger. Be that as it may, they did in fact so acquit him, and accordingly this part of the charge must not be held against him in the present appeal.

The three cases with which their Lordships have so far dealt, now reduced to two by the Disciplinary Committee's decision in the case of Mrs. Moger, may conveniently be referred to as the cases of "overcharging." The appellant's defence in regard to them is to the effect that while he admits the fact of overcharging he denies that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled; and attributes the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he entrusted the keeping of his records of the treatment carried out for the patients concerned without adequate supervision or checking.

There remains the more serious matter raised in paragraph 3 (i) of the charge to the effect that the appellant wrongfully certified on form E.C.17 with respect to Mrs. Dennis that 16 fillings were required to make the patient dentally fit when in fact 13 of such fillings were unnecessary. As regards this head of charge (which may conveniently be referred to as the case of wrongful certification) the appellant admitted that on June 10 he submitted form E.C.17 in respect of Mrs. Dennis certifying that 16 fillings were required to render the patient dentally fit; but it was not in dispute that he had in fact filled three of them, and as to the remaining 13 he has throughout maintained the opinion that old fillings in 10 of them which had been previously filled were defective and needed replacement, and the other three were charted as suspect and requiring (or likely to require) attention.

Prior to the present inquiry, the matters complained of in the charge had been investigated by an entirely different body, namely, the local Dental Service Committee constituted under the National Health Service (Service Committees and Tribunal)

Regulations, 1956 (S.I. 1956, No. 1077). There were in fact two such investigations, the first of which, held on July 23, 1958, dealt with the matters concerning Mrs. Dennis now alleged in paragraph 3 (i) and (ii) of the charge. The recommendations of the Dental Service Committee on that occasion were to the following effect: (i) That the Minister of Health be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That until further notice the appellant should, before commencing any treatment, other than an examination or emergency treatment, be required to submit for prior approval to the Dental Estimates Board estimates in respect thereof. (iii) That the appellant be paid fees only in respect of the work found to have been satisfactorily completed.

The second investigation by the Dental Service Committee was held on October 13, 1958, and dealt with the matters alleged in paragraphs (1) and (2) of the present charge. The recommendations made by the Dental Service Committee on that occasion were to the following effect: (i) That the Minister be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That the appellant be severely censured and warned that, in the event of a further breach of the terms of service, the Council might consider making representations to the Tribunal (namely, the Tribunal constituted under section 42 of the National Health Service Act, 1946) that his continued inclusion in the Bristol Dental List would be prejudicial to the efficiency of the service.

The Minister of Health subsequently approved the recommendation of July 23, 1958, but in respect of the recommendation of October 13, 1958, reduced the amount to be withheld from £500 to £200.

In the course of the present inquiry reference was made to the investigations held by the Dental Service Committee, and to the outcome of those investigations in the shape of the recommendations to which their Lordships have alluded, and documents relating to these investigations have been included in the record prepared for the purposes of the present appeal. It is not in dispute that these investigations were held by the Dental Service Committee and that these recommendations resulted; but this, in their Lordships' view, carries the matter no further. The appellant's conduct was admittedly careless, and it is perhaps not surprising that the Dental Service Committee should have regarded it as involving breaches of the appellant's terms of service as a dentist on the National Health Service list, and as calling for severe measures. But the question which the Disciplinary Committee had to decide in the present inquiry was whether in relation to the matters complained of in the charge as proved or admitted before them the appellant had been guilty of infamous or disgraceful conduct in a professional respect.

The outcome of the Dental Service Committee's investigations having been communicated to the General Dental Council the Registrar to that body by letter dated July 30, 1959, informed the plaintiff that he was liable to be summoned before the Disciplinary Committee on a charge of infamous or disgraceful conduct in a professional respect within the meaning of section 25 of the Dentists Act, 1957, on grounds set out in the letter which raised the cases of Mrs. Dennis, Mrs. Moger and Miss Mathews and of another patient whose case has not been pursued in the present proceedings, and asked the appellant for any explanation or observations he might wish to make. That letter elicited a reply from the appellant dated August 1, 1959, which contained the following passages on which Mr. Widgery (appearing as solicitor to the Council) placed some reliance:

"I am filled with much humiliation and mortification by "this, as I have never in my life been so bluntly accused of "stealing. Indeed, I am very deserving of the fine which has "been imposed upon me, as a result of gross carelessness of "failing to check all National Health forms and keeping accurate "records.

"I must explain that, as a young practitioner, I had at the "time of these cases, very little experience, in fact under a "year's experience of the Health Service. I made the rather "serious mistake of leaving all forms and records to the entire "care of my receptionist. Although she cannot be held "responsible for mistakes made in my surgery, her marked "irresponsibility was discovered when these cases were brought "to light, and she was in consequence instantly dismissed. "These mistakes did not only result in very bad charting, but "it also resulted in the claiming of fees for work not done, and "also in the not claiming of fees for work done.

. . . .

"I am sincerely ashamed of myself that my recklessness has "occasioned such suspicion. I am very sorry indeed that this "is so, and can assure you, that since this happened, everything "possible is being done to ensure that it does not happen again."

The only witness before the Disciplinary Committee on the appellant's side was the appellant himself. [His Lordship referred to evidence given by the appellant in the cases of Miss Mathews and Mrs. Moger and continued:] As to the overcharging in the case of Mrs. Dennis, the appellant (record page 29) explained that she came to him the day before he was due to go on holiday and that he did three fillings in teeth 4, 6, and 7 upper left and told the receptionist which teeth he had done, implying that he left it to her to make the appropriate entries in the patient's record card. On his return from holiday he received an official letter asking him to forward the E.C.17. He then took the patient's record card and found that it showed that he had done fillings in teeth 4, 5, 6 and 7 upper right, and proceeded to fill in the E.C.17 as the record card showed.

[His Lordship referred to the cross-examination of the appellant on the cases of overcharging (record page 35) and continued:] As to the case of wrongful certification, also concerning Mrs. Dennis, it appears that Mrs. Dennis was not satisfied that all the treatment prescribed for her by the appellant was necessary, and consulted her doctor, who referred her to another dentist, Mr. J. G. James; and that, the case having come to the notice of the Dental Estimates Board, they asked the appellant for Mrs. Dennis's E.C.17. The appellant, according to his evidence, entered on the E.C.17 the four fillings erroneously entered on Mrs. Dennis's record card as having been done and sent off the card as requested, making no claim for payment except for the four fillings which should have been only three, the fourth being the subject of the case of overcharging alleged with respect to Mrs. Dennis. Actually, it would seem that the E.C.17 as sent to the Board showed 16 fillings in column 1 of part 2 of the form (which, as above explained, is designed for showing the treatment which in the opinion of the dentist is necessary) of which three had actually been done by the appellant, leaving 13 remaining to be done, of which 10 had been filled before Mrs. Dennis came to him and the remaining three had no fillings in them. The appellant maintained throughout his evidence on this part of the case that the old fillings in the 10 teeth which had been previously filled were defective and needed attention, while the three which had never been filled were suspect and likely to require attention. Consideration of this part of the case is complicated by the fact that it seems to have been the plaintiff's practice to enter in column 1 of part 2 of the E.C.17 not merely work necessary to be done but work likely to be found necessary on further investigation, and in the latter case to delete the relevant entries from column 1 in the event of the work being found superfluous. In other words, he treated the entries in column 1 as provisional and finalised them when the treatment was completed by reference to the work actually done. Thus if Mrs. Dennis's treatment had gone to completion the appellant, before certifying for his remuneration, would have struck out of column 1 any work which in fact had been found unnecessary. But the treatment was never completed because the Dental Estimates Board called in the E.C.17, and the appellant sent it to them just as it was, including the suspect cases. This practice was not warranted by the Regulations, and in fact involved a misuse of column 1 which might well lead to confusion. The more important question, however, is whether, given this misapprehension on the appellant's part as to the use of column 1, he honestly believed that these 13 teeth either needed or were likely to be in need of treatment. The appellant's evidence, if accepted, makes it clear that he did honestly so believe. Mr. James (who has already been mentioned) and Mr. Vernon Howarth, the two dentists who gave evidence for the Council on the case of wrongful certification, disagreed with the appellant but admitted that the matter was one of opinion and certainly did not say that no dentist could honestly be of the opinion expressed by the appellant.

As to the scope of the appellate jurisdiction conferred on their Lordships by section 29 of the Dentists Act, 1957, Mr. Widgery Q.C. (for the General Dental Council as respondents in the appeal) accepted a submission made by Mr. Norman Richards Q.C. (for the appellant) to the effect that such an appeal is an appeal by way of rehearing, to which the same principles apply as are applicable to an appeal to the Court of Appeal against the decision of a judge of the High Court sitting as a judge of fact at first instance, and accordingly their Lordships find it unnecessary to refer to the authorities cited by Mr. Norman Richards in support of this proposition. In this connection their Lordships were properly reminded of the principle that an appellate court should not lightly differ from the finding of a trial judge on a question of fact and that "it would be difficult for it to do so where the finding "turned solely on the credibility of a witness": see *Benmax* v. *Austin Motor Co. Ltd.*[1]; and note the distinction drawn by that case between the finding of a specific fact (which prima facie is a matter for the judge of first instance) and the drawing of inferences from the facts specifically found which, subject to the weight properly due to the opinion of the trial judge, is a matter on which the appellate court may properly regard itself as free to form its own view.

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[1] [1955] A.C. 370, 373 (H.L.); [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

Thus in the present case a finding by the Disciplinary Committee that the appellant claimed fees for work which had not been done, and as to the circumstances in which he did so, would be a finding of specific facts which the appellate tribunal should prima facie accept: whereas a finding that on the specific facts so found the appellant was in relation to the matter in question guilty of infamous or disgraceful conduct in a professional respect would be in the nature of an inference from the specific facts found, and as such more readily open to review.

Their Lordships would add that the question whether in relation to a given matter a dentist has been guilty of infamous or disgraceful conduct is in their opinion a question of mixed fact and law, the question of law being whether on the facts proved or admitted the dentist has been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957.

In applying the above principles to the present case, their Lordships are put in some difficulty by the circumstance that beyond finding the facts alleged in each paragraph of the charge proved the Disciplinary Committee gave no reasons for its determination. Their Lordships are thus left without any express guidance as to the view of the facts upon which the Disciplinary Committee proceeded.

Their Lordships have also found some difficulty with regard to the precise meaning and effect of the adverb " wrongfully " which appears in each paragraph of the charge and in questions put to the appellant. Each paragraph of the charge states the act complained of and states that it was " wrongfully " done. It may thus be argued that, in finding the facts alleged in each paragraph of the charge proved, the Disciplinary Committee have found that in each case the act complained of was not only done but was " wrongfully " done, and that this without more would suffice to convict the appellant of infamous or disgraceful conduct. The word " wrongfully " is, however, of wide and uncertain import. It can be regarded as adding nothing to the acts complained of, which were plainly wrongful in the sense that the appellant ought not to have done them. On the other hand, it may be regarded as imputing an unspecified degree of culpability of an undefined character ranging from mere carelessness to fraud or dishonesty; it clearly cannot be held that every act which can be characterised as " wrongful " in one sense or another is infamous or disgraceful. The Disciplinary Committee clearly recognised this in the case of Mrs. Moger, where they found the facts alleged to have been proved, including the allegation that the overcharge was made wrongfully, but nevertheless acquitted the appellant of infamous or disgraceful conduct in Mrs. Moger's case. Their Lordships think that the solution is to be found in sub-paragraph 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957 (S.I. 1957, No. 1265). That sub-paragraph provides: " (2) Where in a case relating to conduct the Committee have " found that the facts or any of them alleged in any charge have " been proved to their satisfaction (and have not on those facts " recorded a finding of not guilty) "—as they did in Mrs. Moger's case—" the Committee shall forthwith consider and determine " whether in relation to the facts found proved as aforesaid the " respondent is guilty of infamous or disgraceful conduct in a " professional respect. . . ."

This shows that the inquiry is to be carried out in two stages, the first directed to finding whether the primary or specific matters of fact alleged, including any facts bearing upon the question of culpability or " wrongfulness," have been proved, and the second to determining whether on the facts so found the respondent has been guilty of infamous or disgraceful conduct.

Mr. Widgery argued that the proved or admitted fact that the overcharging took place (no matter how it came about) sufficed to raise a prima facie case with respect to the overcharging in the cases of Miss Mathews and Mrs. Dennis, on which the Disciplinary Committee were warranted in finding the appellant guilty of infamous or disgraceful conduct unless he tendered an explanation which the Disciplinary Committee found acceptable; and Mr. Widgery invited us to infer that the Disciplinary Committee did not accept the appellant's story to the effect that he relied on the receptionist to make the proper entries or corrections in the documents.

Their Lordships cannot accept this submission. It appears to them that the matter fell to be judged by reference to the evidence as a whole, including the appellant's explanation of the way in which the cases of overcharging arose. It further appears to their Lordships that inasmuch as the findings of the Disciplinary Committee on the cases of overcharging contained nothing to indicate that it did not accept the appellant's evidence as true, and inasmuch as the solicitor in conducting the Council's case did not challenge the truth of the appellant's explanation in cross-examination or otherwise, but on the contrary relied upon it as involving gross carelessness on the appellant's part, and inasmuch as the cases of overcharging were never put as cases involving fraud or dishonesty on the part of the appellant as distinct from carelessness or negligence, the Disciplinary Committee must be taken to have accepted the appellant's explanation as true, and to have held that the appellant's conduct in relation to the cases of overcharging with respect to Miss Mathews and Mrs. Dennis amounted, on his own explanation of it, to infamous or disgraceful conduct.

The question, then, is whether on this view of the facts the Disciplinary Committee were justified in finding the appellant guilty of infamous or disgraceful conduct. Their Lordships find this meaning assigned to the word " infamous " in the O.E.D.: " 2. Deserving of infamy: of shameful badness, vileness, or " abominableness; of a character or quality deserving utter " reprobation." (One of the strongest adjectives of detestation.)

The meaning assigned to the word " disgraceful " is hardly less extreme: " 2. Full of or fraught with disgrace; that brings disgrace upon the agent; shameful, dishonourable, disreputable."

It must, of course, be remembered that in the present case the words " infamous or disgraceful conduct " should be construed in conjunction with the words " in a professional respect "; and we were referred in this connection to the well-known case of *Allinson* v. *General Council of Medical Education and Registration* [2] where an injunction was sought by a medical practitioner against the defendant council from allowing his name to remain struck out from the medical register kept by the defendant council under the Medical Act, 21 and 22 Vict. c. 90. By section 29 of that Act the name of any medical practitioner judged after due inquiry by the council " to have been guilty of infamous conduct " in any professional respect " was liable to be erased from the register. The plaintiff's name having been so erased he brought his action for an injunction to the effect above mentioned, claiming that the proceedings leading to the erasure of his name were void on the ground (inter alia) that there was no evidence on which the council could reasonably find that the plaintiff had been guilty of " infamous conduct in any professional respect." This contention was rejected by Collins J. and the Court of Appeal, and Lord Esher said this [3]: " I adopt the definition

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[2] [1894] 1 Q.B. 750; 10 T.L.R. 304 (C.A.).

[3] [1894] 1 Q.B. 750, 760, 761.

"which my brother Lopes has drawn up of at any rate one "kind of conduct amounting to 'infamous conduct in a profes-"'sional respect,' viz.: 'If it is shown that a medical man, "'in the pursuit of his profession, has done something with "'regard to it which would be reasonably regarded as disgraceful "'or dishonourable by his professional brethren of good repute "'and competency,' then it is open to the General Medical Council "to say that he has been guilty of 'infamous conduct in a profes-"'sional respect.' The question is, not merely whether what a "medical man has done would be an infamous thing for anyone "else to do, but whether it is infamous for a medical man to do. "An act done by a medical man may be 'infamous,' though the "same act done by anyone else would not be infamous; but, on "the other hand, an act which is not done 'in a professional "'respect' does not come within this section. There may be "some acts which, although they would not be infamous in any "other person, yet if they are done by a medical man in rela-"tion to his profession, that is, with regard either to his "patients or to his professional brethren, may be fairly considered "'infamous conduct in a professional respect,' and such acts "would, I think, come within section 29."

It should be noted that the conduct there in question was very different from the conduct with which the present case is concerned, and was on the face of it quite plainly of an infamous, or for that matter disgraceful, character; and the jurisdiction which the court was asked to exercise was the limited jurisdiction exercisable by way of control of the proceedings of a domestic tribunal, as distinct from the full appellate jurisdiction invoked in this case.

Granted that in accordance with Lord Esher's definition of "infamous" conduct in a professional respect the full derogatory force of the adjectives "infamous" and "disgraceful" in section 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off.

To make good a charge of "infamous or disgraceful conduct "in a professional respect" in relation to such a matter as the keeping of the prescribed dental records it is not, in their Lordships' view, enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of (to quote the figures in the present case) 424 patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told. To make such a charge good there must, in their Lordships' opinion, (generally speaking) be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose. The question is to some extent one of degree, but in their Lordships' view the cases of overcharging with which this appeal is concerned clearly fall short of the degree of culpability required.

As to the case of wrongful certification, their Lordships cannot regard the appellant's misuse of column 1 of part 2 of the form E.C.17 as amounting to infamous or disgraceful conduct. With respect to the treatment alleged to have been unnecessary, the evidence (as their Lordships have already observed) showed that according to the appellant, he honestly believed it to be necessary (or likely to be found necessary), while the dentists who disagreed with him did not claim that the opinion expressed by the appellant was one which no dentist could honestly hold. In this state of the evidence their Lordships think it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, in their Lordships' view plainly cannot amount to infamous or disgraceful conduct.

Mr. Widgery very fairly admitted that so far as the cases of overcharging alone were concerned the Disciplinary Committee would hardly go the length of erasing a dentist's name merely on account of three such cases (involving in the present proceedings a total, including Mrs. Moger, of £5 7s. 7d. out of total payments of some £1,915).

The record before their Lordships contains passages suggesting that there may have been other cases of overcharging besides those included in the charge—see in particular the appellant's letter of August 1, 1959, referred to above; but it was the duty of the Disciplinary Committee to judge the matter simply by reference to the cases alleged in the charge, or in other words "secundum allegata et probata." This plainly appears from the language of rule 10 (2) of the General Dental Council Disciplinary

Committee (Procedure) Rules, 1957, to which reference has already been made. It was therefore right for the Disciplinary Committee to confine their consideration of the charge to the matters specifically alleged in the charge; and their Lordships, taking the same course, find themselves unable to hold that the appellant was rightly found guilty of infamous or disgraceful conduct in relation to the facts alleged.

For these reasons their Lordships are of opinion that this appeal should be allowed, and that the determination of the Disciplinary Committee should be discharged, and will humbly advise Her Majesty accordingly. The General Dental Council must pay the costs of the appeal.

Solicitors: *Le Brasseur & Oakley; Waterhouse & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1959
June 15, 16, 17;
July 6.

ELECTRIX LTD. . . . . APPELLANTS;

AND

ELECTROLUX LTD. . . . . . RESPONDENTS.

Trade Mark—Registration—Distinctiveness—Registrability of words the phonetic equivalent of non-registrable words—Application to register the mark "Electrix"—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 9, 10, 12 (2).

A company manufacturing electrically driven apparatus sought to obtain registration under section 12 (2) of the Trade Marks Act, 1938, of their mark "Electrix" which it had used in respect of its vacuum cleaners since 1933:—

Held, that as the word "Electrics" was inherently incapable of registration, the word "Electrix" was also unregistrable, for inasmuch as trade marks appeal to the ear as well as to the eye, the objection (whatever it might be) to the registration of a word in its proper spelling applied equally to a word which was merely its phonetic equivalent.

In re Ripley & Son's Trade Mark ("Pirle") (1898) 14 T.L.R. 299; 15 R.P.C. 151 and *In re Joseph Crosfield & Sons Ltd.* [1910] 1 Ch. 130; 26 T.L.R. 100; 26 R.P.C. 837; *In re H. N. Brock & Co.*

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* *Present*: Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow.

Ltd. [1910] 1 Ch. 130, 131; reversing *In re Trade Marks Act,* 1905 (1909) 25 T.L.R. 695 applied.

Decision of the Court of Appeal (sub nom. *In re Electrix Ltd.'s Application*) [1958] R.P.C. 176 affirmed.

APPEAL from the Court of Appeal (Jenkins, Romer and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 14, 1958, reversing the judgment of Wynn-Parry J. dated July 30, 1957, whereby he upheld a decision of the Assistant Comptroller acting for the Registrar of Trade Marks dated January 21, 1957. By the said order the Court of Appeal ordered that the appellants' applications Nos. 690730, B. 718162 and B. 718163 for the registration of trade marks be refused. The appellants had applied to register the trade mark " Electrix " in respect of electric (that is, electrically driven) apparatus as set out hereunder:

Application 690730—July 14, 1950—Electric domestic vacuum cleaner and parts thereof included in Class 9.

Application B. 718163—May 22, 1953—Electrically driven floor polishing machines.

Application B. 718162—May 22, 1953—Electrically driven spraying machines and parts thereof included in Class 7.

The first application was for registration in Part A of the Register, and the other two applications in Part B.

The substantial question in this appeal was whether the word " Electrix " was registrable as a trade mark for electrical apparatus in view of:

(*a*) Its close similarity to the word " Electric " and its identity in sound with the word " Electrics," both unregistrable words.

(*b*) The use by other traders of the words " Electrics " and " Electrix " as part of their trading style to denote the nature of their business, that is, the goods in which they deal.

The facts are stated by Viscount Simonds.

K. E. Shelley Q.C. and *John Whitford* for the appellants. The Court of Appeal accepted the contention of the respondents that if a trade mark is inherently unregistrable, then a mark which is its phonetic equivalent is also unregistrable. The appellants, on the other hand, contend that the question depends entirely upon the circumstances why the first mark is incapable of registration. It is submitted that if a word, which, when pronounced, is purely descriptive, is spelled in a different manner but still sounds the same, it is still not registrable. But if the word in its original spelling was merely unregistrable because of its visual appearance, then the above proposition does not apply.

The word "electric" is a purely descriptive word. If its spelling is altered to "electrik," its phonetic equivalent, it is still not registrable, because it is indistinguishable phonetically from "electric," which is inherently unregistrable. But compare "electrics." That word is not registrable, because visually it is too close to "electric." But the reason for its unregistrability has nothing to do with how the word is pronounced. The sequence of sounds which make up the word "electrix" immediately create the impression that it is a word of trade-mark significance. The fact that it is indistinguishable from "electrics" is quite irrelevant.

In support of their case the respondents rely on a number of authorities: *In re Ripley & Son's Trade Mark* ("Pirle")[1]; *In re Joseph Crosfield & Sons Ltd.* ("Perfection")[2]; *In re H. N. Brock & Co. Ltd.* ("Orlwoola")[3]; *Registrar of Trade Marks* v. *W. & G. Du Cros Ltd.* ("W. & G.")[4]; *In re Garrett's Application* ("Ogee")[5]; *In re R. J. Lea Ltd.'s Application* ("Board- "man").[6] It is to be observed, however, that all the above cases were decided before the coming into force of the amendments introduced by the Trade Marks Act, 1919. In particular, *Ripley's* case[7] was decided under section 64 of the Patents, Designs and Trade Marks Act, 1883, as amended by section 10 of the Patents, Designs and Trade Marks Act, 1888. At the time when the decision in *Ripley's* case[8] was given there was no provision for registration of a mark other than one falling within section 64 (1) (*a*) to (*e*) upon the ground that it might qualify as being a mark distinctive of the applicant's goods unless it could be established pursuant to section 64 (3) (ii) that the mark had been in use before August 13, 1875. No claim was made in *Ripley's* case[9] for registration of the mark as a distinctive mark upon this basis. Furthermore, if in that case the Court of Appeal intended to decide that the phonetic equivalent of a word which is unregistrable, whatever the reason for the unregistrability, is also unregistrable, it is submitted it is erroneous.

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[1] (1898) 14 T.L.R. 299; 15 R.P.C. 151.

[2] [1910] 1 Ch. 130; 26 T.L.R. 100; 26 R.P.C. 837.

[3] [1910] 1 Ch. 130.

[4] [1913] A.C. 624; 29 T.L.R. 772; 30 R.P.C. 660.

[5] [1916] 1 Ch. 436; 33 R.P.C. 117.

[6] [1913] 1 Ch. 446; 29 T.L.R. 334; 30 R.P.C. 216.

[7] 14 T.L.R. 299.

[8] Ibid.

[9] Ibid.

The correct proposition is that if a word when spoken has a purely laudatory, descriptive or geographical signification, so that it is unregistrable for that reason, a word that is the phonetic equivalent of such a word is also unregistrable. But if the reason for the unregistrability of the first word is different, for example, if visually it is not sufficiently differentiated from an unregistrable word, its phonetic equivalent may well be registrable.

In the present case there is evidence of distinctiveness which the Assistant Comptroller accepted, and, unless it can be shown that there is some overwhelming rule of law so strong that it overrules such evidence and prevents registration, the order of the Court of Appeal should be reversed and the decision of the Assistant Comptroller and that of Wynn-Parry J. allowed to stand. It is submitted that no such rule of law can be extracted from the authorities: *In re Ripley & Son's Trade Mark*[10]; *In re Joseph Crosfield & Sons Ltd.*[11]; *In re H. N. Brock & Co. Ltd.*[12]; *Registrar of Trade Marks* v. *W. & G. Du Cros Ltd.*[13]; *In re Garrett's Application*[14]; *In re R. J. Lea Ltd.'s Application*[15]; *A. Baily & Co. Ltd.* v. *Clark, Son & Morland Ltd.*[16]; *Yorkshire Copper Works Ltd.* v. *Registrar of Trade Marks*[17]; *In re Dunlop Rubber Co. Ltd.'s Application.*[18] [Reference was also made to section 9 (5) of the Trade Marks Act, 1905; section 7 of the Trade Marks Act, 1919; sections 4, 5, 8 and 9 of the Trade Marks Act, 1938.]

John Whitford following. Since the coming into force of the Trade Marks Act, 1919, there has been no decision in the Court of Appeal or of the House of Lords on registrability save in cases relating to geographical names: the *Glastonbury* case,[19] the *Liverpool* case[20] and the *Yorkshire* case.[21] The appellants accept, however, that there are words such as, for example, geographical names, which in their nature cannot be adapted to distinguish. It is submitted, however, that provided the tribunal is satisfied that a mark applied for is not, because of its nature, wholly incapable of distinguishing, registration, nevertheless, may be permitted on satisfactory evidence of distinctiveness. As to the question of distinctiveness, Lord Parker of Waddington in the *W. & G.* case[22] sets out the correct principle to be applied.

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[10] 14 T.L.R. 299.

[11] [1910] 1 Ch. 130.

[12] Ibid.

[13] [1913] A.C. 624.

[14] [1916] 1 Ch. 436.

[15] [1913] 1 Ch. 446.

[16] [1938] A.C. 557; 54 T.L.R. 688; [1938] 2 All E.R. 377.

[17] [1954] 1 W.L.R. 554; [1954] 1 All E.R. 570; 71 R.P.C. 150.

[18] (1942) 59 R.P.C. 134.

[19] [1938] A.C. 557.

[20] (1929) 46 R.P.C. 99.

[21] [1954] 1 W.L.R. 554.

Kenneth Johnston Q.C. and *Geoffrey Tompkin* for the respondents, and *P. J. Stuart Bevan* for the Registrar of Trade Marks were not called on.

Their Lordships took time for consideration.

July 6, 1959. VISCOUNT SIMONDS. My Lords, this appeal relates to three applications by the appellants, Electrix Ltd., for the registration as a trade mark of the single word "Electrix." The first application, which was made on July 11, 1950, was for its registration in respect of "electric domestic vacuum cleaner "and parts thereof included in Class 9." The other applications were of later date and were in respect of other electrically driven machines, one of them also in Class 9, the other in Class 7. It is conceded that the two later applications stand or fall with the earlier one: I will therefore say nothing more about them. All the applications were opposed by the respondents, Electrolux Ltd., but were granted by the Assistant Comptroller, whose decision was affirmed on appeal by Wynn-Parry J.[1] The respondents appealed to the Court of Appeal,[2] who unanimously reversed the decision of the learned judge. Hence the appeal to this House.

My Lords, I think that the real point in the case is a short one and not difficult to decide, but so much importance has been attached to what has been called the background of the case that I must trouble your Lordships with a short history of some of the facts which preceded the relevant applications.

In 1928 the respondents had registered the word "Electrux" as a trade mark in respect of a specification of goods which included the goods the subject of the appellants' applications. They renewed the registration in 1942 but made no use of it until 1947. In the meantime the appellants had been incorporated and from 1933 onwards, except for a period of interruption caused by the war, sold vacuum cleaners under the mark "Electrix." They were unaware of the respondents' registered mark "Electrux." Their sales were said to have been substantially increased as the result of an exhibition in the autumn of 1946 under the title "Britain can make it." In 1947 the respondents, realising that their mark "Electrux" was in danger of being struck off the register for non-user, and wishing to stop the use by the appellants of their mark "Electrix," began to use the mark "Electrux" in connection with a certain model of vacuum cleaner. They were entitled to do so and their user was bona fide. Having done so, they challenged the user by the appellants of the mark "Electrix" on the ground that it infringed their mark, and eventually brought an action to restrain it. In this action it was held by Lloyd-Jacob J., and on appeal by the Court of Appeal, that the mark "Electrix" was an infringement of "Electrux," that the latter mark was valid and that the conduct of the respondents did not amount to acquiescence. An injunction was accordingly granted as asked. The scope of the registration of "Electrux" was, however, limited in a way that does not concern the present appeal. These proceedings are relevant to the appeal in this way. The appellants as an additional defence to the action sought to obtain registration of their mark "Electrix" under the provisions of section 12 (2) of the Trade Marks Act, 1938, having previously made an application to the Registrar for such registration, and they served a motion in the action asking for an order to that effect. Lloyd-Jacob J. refused to make the order, holding that the application should first be determined by the Registrar, but granted a stay of execution of the injunction pending the Registrar's determination. The suspension was continued by the Court of Appeal. Thus the application came in due course before the Registrar and I have already narrated what happened to it. The question is whether the Court of Appeal were right in holding that the word "Electrix" ought not to be registered. It is possible to feel some sympathy for the appellants, if the injunction now suspended becomes operative, for they appear to have built up a substantial goodwill in "Electrix" as a common law mark. But that cannot influence the decision which it falls to the House to make.

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[22] [1913] A.C. 624, 634.
[1] [1957] R.P.C. 369.
[2] [1958] R.P.C. 176.

My Lords, I can conveniently state the problem to be solved by the citation of a single sentence from the judgment of the Court of Appeal[3]: "The doctrine," they said, "as we understand it, is that, if a given word is for any reason unregistrable "in its proper spelling, then, inasmuch as trade marks appeal "to the ear as well as to the eye, the objection (whatever it "may be) to the registration of the properly spelt word applies "equally to a word which is merely its phonetic equivalent." Applying that view of the law to the facts of the present case, the Court of Appeal held that, "electrix" being the phonetic equivalent of "electrics," and that word being unregistrable, "electrix" also was unregistrable.

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[3] [1958] R.P.C. 176, 193, 194.

In my opinion the proposition or doctrine of law, upon which the Court of Appeal founded, is accurately stated and supported by authority and reason, and it was correctly applied. The more important of the cases which establish it are cited in the exhaustive judgment of the Court of Appeal. At the risk of repetition I must refer to some of them. In *In re Edward Ripley & Son's Application*[4] the question was whether the word "Pirle" should be registered for goods in Class 34, namely, cloths and stuffs of wool, worsted and hair, the word "Pirle" being formed from the name "Ripley" with the omission of the "y." The application was refused on the ground that the word was identical in sound with "Pearl" and that "Pearl" itself was not eligible for registration, being a term of commendation. Kekewich J. upheld the refusal and so did the Court of Appeal in words which I quote because they are directly apposite[5]: "We do not see "our way," said Lindley M.R., "to accede to this application. "We cannot do it, unless we are prepared to lay down a pro-"position that I do not think any court should. We cannot say "that a man may register, in any class of goods, a word which "sounds exactly like a word that could not be registered. The "reason is obvious; it would be putting a monopoly upon the "public, which would be utterly unjustifiable. That is the short "reason." My Lords, the reason was short and was obvious. The judgment too was short: I have cited the whole of it. There is not a word in it to suggest that it matters why the word is unregistrable which the word proposed to be registered sounds exactly like. And in the 70 years which have passed since those very learned judges gave that clear and emphatic judgment, there has never been a suggestion that it is material why the unregistrable word is unregistrable nor any attempt to qualify the generality of its language. That case was decided under the Acts of 1883 and 1888. The next cases that I cite were heard after the passing of the Trade Marks Act, 1905. That Act made no difference to the relevant principle. Thus, in the "*Perfection*" and "*Orlwoola*" cases,[6] *In re Joseph Crosfield & Sons Ltd.*; *In re H. N. Brock & Co. Ltd.*, Lord Cozens-Hardy M.R., dealing

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[4] (1898) 15 R.P.C. 151; sub nom. *In re Ripley & Son's Trade Mark*, 14 T.L.R. 299.

[5] 15 R.P.C. 151, 155.

[6] [1910] 1 Ch. 130, 137.

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with both cases, said[7]: "There is one important distinction "between word marks and other marks. The former appeal to "the ear as well as, and indeed more than, to the eye. The "latter appeal to the eye only. It seems to follow that a word, "not being an invented word, ought not to be put on the register "if the spelling is phonetic and resembles in sound a word which "in its proper spelling could not be put on the register." Here again the language is general. The learned Master of the Rolls goes on to deal separately with the two marks, of which one was of a laudatory character; the other had reference to the quality or nature of the goods. In regard to "Perfection" he said[8]: "It was admitted by counsel that 'Perfect' could not be regis-"tered, and that admission is fatal to the case of the appellants," and in regard to "Orlwoola" he said[9]: "It is plain that 'all "'wool' could not be registered, and indeed these words are "disclaimed on the face of the register. This word is a mark "which appeals to the ear far more than to the eye, and for "reasons which I stated in my general observations I think it is "obviously not distinctive." That is to say, "Orlwoola" could not be registered, because to the ear it sounded like the unregistrable "all wool." I must pass over the judgments of Fletcher Moulton and Farwell L.JJ., though there is much in them to support the doctrine laid down in the judgment of the Court of Appeal in the present case and nothing from which the appellants can derive comfort. But I cannot refrain from citing a short passage from the judgment of Fletcher Moulton L.J. With regard to "Orlwoola" he said[10]: "The misspelling does not affect the "words when spoken, so that we have only to decide whether "the words 'all wool' are proper for registration in respect of "such goods." That was for him the sole question, just as for your Lordships the sole question is whether the word, of which "Electrix" is the phonetic equivalent, is registrable—a question that in this case admits of only one answer. So also in the *Ogee* case[11] (*In re Garrett's Application*) Lord Cozens-Hardy M.R., reiterating that a trade mark appeals to the ear as well as to the eye, said[12]: "If the letters 'O.G.' could not be registered, it "seems to me that the word 'Ogee' ought not to be registered. ". . . The applicant may or may not have a right to 'Ogee' "as a common law mark, but it is not a registrable mark." It would be difficult to find words more directly applicable than these to the present case. Rather surprisingly, learned counsel for the appellants sought to rely on the speech of Lord Parker in the *W. & G.* case[13] (*Registrar of Trade Marks* v. *W. & G. Du Cros Ltd.*). In that speech there is much that is valuable. The noble and learned Lord had been counsel to the Board of Trade at the passing of the Act of 1905 and knew well the problem which led to its enactment. He pointed out that the definition of "distinctive" as meaning "adapted to distinguish" made no change in the law, for the word "distinctive" had been used in that sense in the earlier Acts. He emphasised that in order to determine whether a mark is distinctive it must be considered apart from the effects of registration, and (what is more important to the present case) that present distinctiveness in fact is not conclusive that a mark is adapted to distinguish. But neither in his speech nor in those of the other learned Lords was there suggested any qualification of the general principle that the phonetic equivalent of an unregistrable word is itself unregistrable. That was not in fact the question which had to be decided. The question was whether "W. & G.," not its phonetic equivalent, was registrable. The same may be said of the *Glastonbury* case[14] (*A. Baily & Co. Ltd.* v. *Clark, Son & Morland Ltd.*) and of the *Yorkshire Copper Works Ltd.* application[15] (*Yorkshire Copper Works Ltd.* v. *Registrar of Trade Marks*), which recently came before the House, and of the *Trakgrip* case[16] (*In re Dunlop Rubber Co. Ltd.'s Application*), which it fell to me to decide. In these and other cases that were cited, it was the question of distinctiveness that was elaborately discussed. It is obvious that in observing the prescription of section 9 (3) of the Act of 1938, viz., that "in determining whether a trade mark is adapted to "distinguish as aforesaid, the tribunal may have regard to the "extent to which (*a*) the trade mark is inherently adapted to "distinguish as aforesaid; and (*b*) by reason of the use of the "trade mark or of any other circumstances, the trade mark is "in fact adapted to distinguish as aforesaid," there is room for wide difference of opinion. It has nevertheless been consistently laid down that the discretion of the Registrar is not to be lightly overruled, and the general excellence of the judgment of the Assistant Comptroller in this case predisposes me to uphold it.

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[7] [1910] 1 Ch. 130, 142.
[8] Ibid. 143.
[9] Ibid. 143, 144.
[10] Ibid. 150.
[11] [1916] 1 Ch. 436; 33 R.P.C. 117.
[12] [1916] 1 Ch. 436, 443.

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[13] [1913] A.C. 624, 633; 29 T.L.R. 772; sub nom. *In re W. & G. Du Cros Ltd.'s Applications*, 30 R.P.C. 660.

[14] [1938] A.C. 557; 54 T.L.R. 688; [1938] 2 All E.R. 377.

[15] [1954] 1 W.L.R. 554; [1954] 1 All E.R. 570; 71 R.P.C. 150.

[16] (1942) 59 R.P.C. 134.

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But it appears to me that he has erred in principle. For, though he does not say in so many words that "electrics," of which "electrix" is the phonetic equivalent, could or could not be registered, saying merely "this does not mean that I "necessarily regard 'Electrics' as a word which could properly "be registered," it is clear that he would not regard it as decisive of the unregistrability of "Electrix" that "Electrics" is unregistrable. Here he was, in my opinion, clearly wrong and, if I read his judgment aright, the learned judge fell into the same error. So also the appellants have sought to ignore the unregistrability of "Electrics" and claimed nevertheless that "Electrix" was registrable. Thus in their formal case they say: "The "appellants do not contend that the word 'Electrics' would be "registrable," and they did not resile from this position in argument before the House. Let it not be thought that I criticise them for making the admission. It appears to me that, whether or not distinctiveness in fact was, or could be acquired by "Elec- "trics," of which there was, of course, no evidence, it would be a hopeless task to persuade the tribunal that it was not inherently unregistrable. From this it follows that the word "Electrix" cannot be registered.

In my opinion the appeal must be dismissed with costs.

LORD REID. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

VISCOUNT SIMONDS. LORD COHEN and LORD SOMERVELL OF HARROW, who are unable to be here today, have asked me to say that they have read and concur in the opinion which I have just given.

Appeal dismissed with costs.

Solicitors: *Frere, Cholmeley & Nicholsons; Steadman, Van Praagh & Gaylor.*

J. A. G.

J. C.*

1960
June 20.

GHANA COMMERCIAL BANK . . . APPELLANTS;

AND

D. T. CHANDIRAM AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF GHANA.

West Africa—Ghana—Execution—Ghana Supreme Court (Civil Procedure) Rules, 1954, *Ord.* 43, *rr.* 7, 11.

Mortgage—Subrogation—Moneys paid off by third party—Intention to keep mortgage alive for own benefit—Subsequent invalid mortgage to third party—Effect.

Execution—Sale under fieri facias—Title transferred—Sale of land subject to equitable mortgage.

A debtor, the owner of certain real property, on July 16, 1954, created an equitable mortgage on it in favour of the B. Bank by deposit of the title deeds to secure the payment and discharge of his liabilities to that bank. On September 4, 1954, at the request of the debtor the deeds were sent to the appellant bank with the permission of the B. Bank against the appellant bank's undertaking to hold them on the B. Bank's behalf. On September 24, 1954, a writ of fieri facias for the attachment of the property was issued at the instance of a judgment creditor pursuant to Order 43 of the Ghana Supreme Court (Civil Procedure) Rules, 1954, which, by rule 7, prohibited the debtor from "alienating the property by "sale, gift, or in any other way, and all persons from receiving the "same by purchase, gift, or otherwise," and by rule 11 provided that any alienation without leave of the court after attachment should be null and void.

On October 27, 1954, the debtor executed a legal mortgage of the property in favour of, and conveyed the property to, the appellant bank to secure repayment of money owing or to become owing by him to that bank, and on the same day the appellant bank paid to the B. Bank the sum owing to it by the debtor on the security of the equitable mortgage, retaining in their custody the deeds which had been passed to them.

On November 4, 1954, the debtor let the property to the second respondent.

On April 16, 1955, the second respondent being in possession, the property was sold to the first respondent at a court auction.

After competing claims by the appellant bank that the rent should be paid to it as the holder of the legal estate pursuant to the legal mortgage, and by the first respondent as purchaser of the property at the court sale, the latter instituted the present proceedings against the tenant and the appellant bank claiming a declaration of his title of ownership and possession:—

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* *Present*: LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

Held, (1) that the legal mortgage by the debtor to the appellant bank must, by virtue of the provisions of Order 43, be taken to have been null and void.

(2) That a purchaser of property under the execution of a writ of fieri facias stepped into the shoes of the judgment debtor, and what he purchased was no more than the right, title and interest of the judgment debtor therein, and if the property was in any way encumbered the purchaser bought subject to that charge or encumbrance (post, p. 743).

The attachment of September 24, 1954, took effect subject to the B. Bank's interest as equitable mortgagee, and the benefit of that interest continued after the date of the attachment to be capable of assignment or devolution whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place. Accordingly, by paying the amount due to the B. Bank the appellant bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured over the first respondent's interest as had theretofore been enjoyed by the B. Bank (post, pp. 744–745).

Dicta of Lord Chelmsford in *Wickham* v. *New Brunswick and Canada Railway Co.* (1865) L.R. 1 P.C. 64, at 75 and 76, P.C. and *Dadzie* v. *Kojo* (1940) 6 W.A.C.A. 139 applied.

Butler v. *Rice* [1910] 2 Ch. 277 and *Chetwynd* v. *Allen* [1899] 1 Ch. 353 considered.

(3) As between himself and the appellant bank the first respondent was absolutely entitled to the property, subject to the charge thereon created by the equitable mortgage, and as against the appellant bank he was entitled to possession or receipt of the rents and profits of the property unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage.

Judgment and decree of the Court of Appeal of Ghana discharged.

APPEAL (No. 30 of 1959) from a judgment and decree of the Court of Appeal, Ghana (December 2, 1958) affirming, save with a modification as to mesne profits, a judgment and decree of the Ghana High Court (September 3, 1957).

The following facts are taken from the judgment of the Judicial Committee: This case concerned competing interests in certain real property at Accra, the rival claimants being Ghana Commercial Bank, formerly the Bank of the Gold Coast—defendants in the action and now appellants (hereinafter called "the "Ghana Bank"), who claimed to be mortgagees of the property; and D. T. Chandiram, plaintiff in the action and now respondent (hereinafter called "the purchaser"), who claimed to have bought the property at an execution sale free from the alleged mortgage. Also concerned in the litigation was one J. Mensah (hereinafter called "the tenant") who, in his capacity as Manager of St. John's Grammar School at Accra, was in possession of the property as tenant at the date of the execution sale, but who thenceforth, according to the purchaser, became a trespasser, by refusing to attorn tenant to the purchaser and insisting on paying his rent (£75 per month) to the Ghana Bank, who demanded such payment on the strength of the alleged mortgage. The purchaser accordingly joined the tenant as a defendant along with the Ghana Bank, and he had been made a respondent in the present appeal but was not represented at the hearing before the Board.

The action was brought by the purchaser as plaintiff in the Land Court at Accra claiming against both defendants jointly and severally:—"(*a*) A declaration of his title of ownership to the "said premises; (*b*) £500 general damages for trespass; (*c*) £2,025 "as mesne profits at the rate of £75 a month as from April 16, "1955" (the date of the execution sale) "to September 15, "1956" (the end of the last whole month prior to the issue of the writ on September 26, 1956) "and any further sums of money by "way of mesne profits that will have accrued up to the date of "judgment; (*d*) recovery of possession."

The case was tried in the Land Court before Ollennu J., who by a judgment and decree dated September 3, 1957, granted the purchaser the relief claimed (save that he reduced the claim for damages for trespass to £100) with costs. He assessed the mesne profits at £75 per month from April 16, 1955, to September 15, 1957, and found them to amount to £2,925; and he directed that the recovery of possession should take effect from September 15, 1957.

From that judgment and decree both defendants appealed to the Court of Appeal of Ghana (Korsah C.J., Van Lare and Granville Sharp JJ.A.) who, by a judgment and decree dated December 2, 1958, dismissed the appeal, save that the learned judge's calculation of the mesne profits was corrected from £2,925 to £2,175.

From the last-mentioned judgment and decree the Ghana Bank now appealed to the Board.

On July 16, 1954, one Ebenezer Ofue Holomah (hereinafter called "the debtor"), who was then the owner of the property in dispute, created an equitable mortgage upon it in favour of his bankers, Barclays (D.C. & O.) Ltd. (hereinafter called "Barclays") by the usual method of depositing with Barclays the title deeds to the property, together with a memorandum of deposit signed by him and stating (to put it shortly) that the deeds had been so deposited with the intent to create an equitable mortgage on all the hereditaments and property comprised therein for assuring the payment and discharge on demand of all moneys and liabilities then or thereafter due from or incurred by the debtor to Barclays. The memorandum contained a usual form of undertaking on the part of the debtor to execute on demand a legal mortgage of the property to Barclays in such form and with such provisions and powers of sale, leasing and appointing a receiver as Barclays might require. The deeds were not in fact retained in the physical possession of Barclays, but were held on their behalf by their solicitor, Mr. H. V. A. Franklin. It was not suggested that this circumstance had any material bearing on the case.

On September 4, 1954, Mr. Franklin sent the deeds to the Ghana Bank with a letter in which he stated that the debtor had requested him to hand them to the Ghana Bank, and that he had obtained Barclays' permission to do so against the Ghana Bank's undertaking to hold them on their behalf. According to the evidence of Kwasi Amoako Atta, the credit manager of the Ghana Bank, the deeds were received by him on September 9. There was no evidence as to the reason for this change in the custody of the deeds, but it did not materially alter Barclays' position. It was simply a substitution of the Ghana Bank for Mr. Franklin as the agents by whom the deeds were to be held on Barclays' behalf.

On September 24, 1954, a writ of fi. fa. for the attachment of the property was issued under the hand of the Chief Justice at the instance of one M. D. Bassil who had obtained a judgment dated July 27, 1954, against the debtor in the Divisional Court, Sekondi. The attachment was made by an attachment notice issued by the Deputy Sheriff and dated September 25, 1954. No question was raised as to its validity. It prohibited the debtor from "alienating the property by sale, gift, or in any other way "and" all persons were thereby prohibited "from receiving the "said property by purchase, gift or otherwise." On the same date auction notices were issued by the Deputy Sheriff advertising the property for sale on October 18, 1954.

The attachment was effected under Order 43 of the Supreme Court (Civil Procedure) Rules, 1954. Order 43 includes the following provisions: "4. If the judgment be for money, and the "amount thereof is to be levied from the property of the person "against whom the same have been pronounced, the court shall "cause the property to be attached in the manner following. . . . "7. Where the property shall consist of lands, houses, or other "immovable property, or any interest therein, either at law or "in equity, the attachment shall be made by a written order of "the Sheriff prohibiting the judgment debtor from alienating the "property by sale, gift, or in any other way, and all persons from "receiving the same by purchase, gift, or otherwise, and the "Sheriff may also, by direction of the court, take and retain "actual possession thereof. . . . 11. After any attachment shall "have been made by actual seizure, or by written order as aforesaid, and in case of an attachment by written order, after it "shall have been duly intimated and made known in manner "aforesaid, any alienation without leave of the court of the property attached, whether by sale, gift, or otherwise, and any "payment of the debt or debts, or dividends, or shares to the "judgment debtor during the continuance of the attachment, "shall be null and void, and the person making such alienation "or payment shall be deemed to have committed a contempt of "court."

The debtor applied for and obtained a stay of execution pending an appeal, which was unsuccessful. Ultimately fresh notices of attachment and auction were issued on January 13, 1955, and the property was ultimately sold to the purchaser on April 16, 1955. It was held in both courts below that notwithstanding the stay of execution the attachment effected on September 25, 1954, remained in full force, and the contrary was not argued before the Board.

On October 27, 1954, the debtor executed a legal mortgage of the property in favour of the Ghana Bank. By this document (to put it shortly) the debtor covenanted with the Ghana Bank to pay on demand all such sums as then were or should from time to time become owing by him to the Ghana Bank (inter alia) on balance of current account and/or loan account and/or any other account sanctioned by the Ghana Bank, with interest at the rate of 7 per cent. on the balance from time to time owing, and conveyed the property to the Ghana Bank, its successors and assigns for ever, subject to the proviso for redemption therein contained. It was not necessary to refer further to the terms of this legal mortgage except to mention that it ended with a provision to the effect that the legal mortgage was not to prejudice or affect the security created by any deposit which might already have been made with the Ghana Bank of the deeds relating to the property or any other securities the Ghana Bank might then or at any time thereafter hold for the moneys thereby secured or any part thereof.

On the same day (October 27, 1954), the Ghana Bank paid to Barclays the sum owing to Barclays on the security of the equitable mortgage of July 16, 1954, retaining in their custody the deeds which had been passed to them by Mr. Franklin to hold on Barclays' behalf. There was no evidence as to the amount owing to Barclays Bank on October 27, 1954, but counsel for the purchaser in his opening speech appeared to have put the amount in respect of which the legal mortgage was given by the debtor at £4,000.

On November 4, 1954, the debtor let the property to the tenant on a monthly tenancy at a rent of £75 per month, and the tenant was in occupation of it at the date of the sale to the purchaser.

As already mentioned, that sale took place on April 16, 1955. Prior to the sale the Ghana Bank had requested the Deputy Sheriff to institute interpleader proceedings, but, for whatever reason, nothing came of this.

In view of an argument addressed to the Board by Mr. Quass Q.C. (for the Ghana Bank) as to the scope and effect of the attachment, it was right to notice that the judge's certificate of sale dated June 29, 1955, described the subject-matter of the sale as consisting of " the right title and interest " of the debtor in the property.

On July 25, 1955, the Ghana Bank's solicitor wrote to the tenant a letter stating that the legal estate in the property was vested in the Ghana Bank under and by virtue of the legal mortgage of October 27, 1954, and requiring the tenant to pay all rent which was then or should thereafter become payable in respect of the property to the Ghana Bank or its duly authorised agent.

On July 28, 1955, the purchaser's attorney wrote to the tenant informing him of the sale of the property to the purchaser on April 16, 1955, and requiring the tenant as from that date to pay the rent of £75 per month in respect of the property to the writer as such attorney.

On August 13, 1955, the tenant wrote to the purchaser's attorney to the effect that the tenant was paying to the Ghana Bank according to their instructions all rents accruing in respect of the property, which course was thereafter persisted in by the tenant in accordance with the Ghana Bank's demand.

In these circumstances the present proceedings were on September 26, 1956, brought by the purchaser against the tenant and the Ghana Bank claiming (so far with success) the relief above described.

1960. May 10, 11, 12. *Phineas Quass Q.C.* and *J. G. Le Quesne* for the appellants. An attachment notice can attach only the interest of the judgment-debtor, and, accordingly, in this case could affect only Holomah's interest in the property, which at all material times was only the equity of redemption. All that could be sold, and was sold, on April 16, 1955, was his equity of redemption. There is nothing in the attachment to prevent the appellants from perfecting what interests they had in the property at any time. The title deeds deposited by Holomah with Barclays Bank were handed over by that bank to the appellants; whatever the terms may have been on which the deeds were originally handed over, shortly afterwards the appellants paid to Barclays Bank the money owed by Holomah and retained the deeds; it should be inferred that they intended to hold the deeds as security for Holomah's debt to them. The appellants thus became entitled to the equitable mortgage originally held by Barclays Bank. On the same day that they paid the money to that bank the appellants took a legal mortgage of the property from Holomah. If they are to rely on the legal mortgage they must show that at the time they took it they were equitable mortgagees; the equitable charge clearly subsisted in Barclays Bank until they were paid off; it all happened simultaneously—the paying off and the taking of the legal mortgage.

It is submitted that there was a valid legal mortgage created in their favour on October 27, 1954, for on that date they were the holders of an equitable mortgage which had existed before the attachment of the property on September 25, 1954. Thus, at the time of the attachment the property was held subject to a mortgage, and the mortgagee was entitled to call at any time, if he chose, for the conversion of that mortgage into a legal mortgage. Such a conversion does not constitute an alienation for the purposes of Order 43 of the Ghana Supreme Court (Civil Procedure) Rules, 1954, since it is not the creation of a right in the property which did not exist before, but only a conversion of an equitable right into a legal right. If that is prevented by Order 43, rr. 7 and 11, then those rules have effected a great change in the law of mortgage and the position of an equitable mortgagee.

The appellants' position is that they do not get their title from the judgment-debtor, but the other way round—from the other mortgagee. [Reference was made to Waldock on the Law of Mortgages, 2nd ed. (1950), p. 55; Coote on Mortgages, 9th ed., vol. 2, p. 1242; *Carter* v. *Wake* [1]; *Parker* v. *Housefield*.[2]] If the Board is satisfied that in the circumstances of this case there is a valid legal mortgage then the appeal must succeed.

Assuming that there is no valid legal mortgage, the submission is that on paying off Barclays Bank, who up to that time had an equitable mortgage, the appellants became entitled to stand in their shoes and therefore themselves became equitable mortgagees on the principle—well established—that a person paying off a mortgage debt is presumed to intend to keep the mortgage alive for his own benefit; the presumption is a very strong one: Waldock on the Law of Mortgages, 2nd ed., p. 320, Halsbury's Laws of England, 3rd. ed., vol. 27, pp. 263, 270, 418; *Patten* v. *Bond* [3]; *Brocklesby* v. *Temperance Building Society*.[4] The best case on this is *Butler* v. *Rice*.[5] Those authorities support the proposition that a person paying off a mortgage is in equity subrogated to the rights of the mortgagee and is entitled to the security until and unless a valid and equally effective security takes its place. See also *Wickham* v. *New Brunswick and Canada Railway Co.*[6] and Coote on Mortgages, vol. 2, p. 1135. The first respondent has no right to the declaration of title granted to him in the courts below; the appellants are entitled to the property subject only to the first respondent's equity of redemption.

S. P. Khambatta Q.C. and *Joseph Dean* for the first respondent. It was rightly said in the judgment of the Ghana Court of Appeal that " a purchaser of a property under the execution of a " fi. fa. steps into the shoes of the judgment-debtor by purchasing " no more than the ' estate ' of the judgment-debtor therein. In " other words, what is sold and what is bought . . . is the right, " title and interest of the judgment-debtor." The material date here is when the property came under attachment—September 24, 1954; at that date where was the legal estate? Defendants' counsel in the trial court said that " the legal estate was vested " in Holomah but the equitable estate became vested in Barclays " Bank on July 16, 1954. Barclays Bank transferred that " equitable estate to the defendant bank on September 9, 1954.

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[1] (1877) 4 Ch.D. 605.
[2] (1834) 2 My. & K. 419.
[3] (1889) 69 L.T. 583.
[4] [1895] A.C. 173; 11 T.L.R. 297, H.L.
[5] [1910] 2 Ch. 277.
[6] (1865) L.R. 1 P.C. 65, 75–76.

"Thus, when the defendant bank subsequently took a mortgage "from Holomah and paid off Barclays Bank the legal estate "passed from Holomah to the defendant bank."

Questions of law, it is submitted, are quite academic on the facts of this case. There is nothing on the material to justify drawing an inference that on September 9, 1954, as submitted by the defendants' counsel, there was a transfer of Barclays Bank's equitable mortgage to the appellant bank, because there is no evidence from which there can be inferred any intention to pay off Barclays Bank before taking the legal mortgage. There is nothing here to show that the appellant bank has in any way perfected its equitable title and taken the legal title. The crux of this case, in considering the rights as between the first respondent as purchaser and the appellant bank—Barclays Bank having disappeared—is that there is first of all nothing in the record to warrant the inference that prior to this execution the legal relationship of debtor and creditor existed between Holomah and the appellant bank. Secondly, the material does not warrant the inference that the appellant bank intended to pay off Barclays Bank on October 27, 1954, and intended to keep their rights under the equitable mortgage until such time as they could call for the execution of the legal mortgage. On the contrary, the material warrants the inference that the appellant bank took the legal mortgage as a different security in order to enable the equitable mortgage to be discharged.

The authorities are careful to point out that on the question of subrogation payment is made with a view to stepping into the shoes of the prior chargee until the title is perfected. [Reference was made to *Brocklesby* v. *Temperance Building Society*,[7] *Butler* v. *Rice*[8] and *In re McMahon*.[9]] The last-named case supports the reasoning of the courts below that at no time did the appellant bank have any interest, legal or equitable, until the legal mortgage. The legal mortgage being null and void under Order 43, there never was any encumbrance—the appellant bank has never encumbered this property. The encumbrance of Barclays Bank was removed at the date of sale. The inferences drawn by the courts below are warranted by the facts of this case.

Joseph Dean following. There are only two issues in this appeal: (1) An issue of law—whether Order 43, r. 11, nullifies the execution of a legal mortgage in favour of an existing equitable mortgagee, or whether it nullifies the assignment of an existing equitable mortgage. (2) An issue of fact—whether in this case there was any transfer of the equitable mortgage to the appellant bank. The submission is that the whole of the argument for the appellants falls down on an issue of fact. The question is whether or not there was an intention on the part of the appellant bank to succeed to the rights under the equitable mortgage, and the evidence rebuts the presumption of such an intention. The evidence is all the other way. There was no connection between the two mortgages—there is a clear dividing line between them, and no intention to connect them. The judgment below is right on the facts. All the authorities show that the question is one of intent, and here that is rebutted. [Reference was made to *Russell* v. *Russell*,[10] *Chetwynd* v. *Allen*[11] and *Butler* v. *Rice*.[12]]

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[7] [1895] A.C. 173, 181.

[8] [1910] 2 Ch. 277, 283.

[9] (1886) 55 L.T. 763.

With regard to the law, the provision in rule 11 nullifying alienations after attachment should not be given the very restricted interpretation for which the appellants contended; it should be construed in accordance with its terms. An assignment of an equitable mortgage without leave of the court is also caught by the rule, which covers all assignments.

Quass Q.C. in reply. It was said that the first respondent has stepped into the shoes of the judgment-debtor; that is agreed, but it does not help him to get a clear title to this property. All that was attached was the right, title and interest of the judgment-debtor—which was the equity of redemption. At the time of the attachment all he had to do was to look at the register and see the appellants' mortgage. A person who seeks a declaration can only succeed on the strength of his own title, not on the weakness of that of the other party. The first respondent cannot succeed on the strength of his title; there was nothing to show that Holomah had an unencumbered title.

The second respondent did not appear and was not represented.

June 20. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: The learned trial judge at an early stage in his judgment said: "It is agreed by counsel for the parties that the main question "to be determined in the suit is 'In whom was the legal estate "'in the property vested on the date of attachment?'" and this statement is fully justified by reference to the notes of counsels' arguments in the record.

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[10] (1783) 1 Bro.C.C. 269.

[11] [1899] 1 Ch. 353.

[12] [1910] 2 Ch. 277.

Then, after a full statement of the facts, the learned judge went on to hold that the attachment of the property made on September 25, 1954, was never lifted (this being a reference to the stay of execution on which some reliance had apparently been placed on the part of the Ghana Bank); that Barclays never at any time transferred their equitable mortgage on the property to the Ghana Bank, but merely created them their agents for the custody of the title deeds; that consequently the Ghana Bank never acquired any proprietary interest which was subsisting or could subsist on September 25, 1954, but were on that date holding the title deeds merely as agents or bailees of Barclays. So far the learned judge was clearly right, if his intention was merely to describe the position as matters stood on September 25, 1954, but his statements to the effect that Barclays "never "at any time" transferred their equitable mortgage to the Ghana Bank, and that the Ghana Bank "never acquired any proprietary "interest legal or equitable in the property," require further examination if and so far as they are intended to apply to the period between the date of the attachment and the date of the execution sale. The learned judge went on to say that "the legal "estate and beneficial interest was on September 25, 1954, vested "in 'the debtor' and in no other person." In saying this the learned judge appears to have overlooked the important circumstance that on September 25, 1954, the debtor's interest in the property was subject to Barclays' equitable mortgage. As to the legal mortgage given by the debtor to the Ghana Bank on October 27, 1954, the learned judge held that the execution of this mortgage by the debtor while the attachment was subsisting without the leave of the court, and the acceptance of it by the Ghana Bank, were in contravention of the provisions of Order 43, rule 7, and that, accordingly, by virtue of the provisions of Order 43, rule 11, this mortgage was null and void. It will be observed that the learned judge said nothing as to the effect on Barclays' equitable mortgage of the payment by the Ghana Bank to Barclays on October 27, 1954, of the balance then owing from the debtor to Barclays on that security. It is clear from the learned judge's note of the argument addressed to him by the defendants' counsel that the point was taken that, even if the legal mortgage was null and void, the Ghana Bank still had the benefit of Barclays' equitable mortgage, having "stepped into the shoes" of Barclays on paying them the amount due under it. In fairness to the learned judge it is right to say that before him the defence based on the continuance of the equitable mortgage for the benefit of the Ghana Bank (as distinct from the argument based on the contention that the Ghana Bank had acquired the legal estate by virtue of the legal mortgage of October 27, 1954), seems not to have been accorded the major importance attached to it at the hearing of the present appeal. Moreover, before the learned judge the claim to the benefit of the equitable mortgage seems to have been based primarily on the erroneous ground that there had been a transfer of the equitable mortgage on September 9, 1954, when the Ghana Bank received the title deeds from Mr. Franklin; and this may have led the learned judge to overlook the alternative claim to the effect that the Ghana Bank acquired the benefit of the equitable mortgage by paying off Barclays on October 27, 1954.

Be that as it may, the learned judge concluded that the purchaser acquired the whole of the right, title and interest which the debtor had in the property on September 25, 1954, comprising the legal estate and beneficial interest, and the consequential right to immediate possession.

He went on to hold that the tenant became a trespasser the moment he refused to acknowledge the title of the purchaser; and that the Ghana Bank were also trespassers in that they claimed to be entitled to possession and had authorised the tenant to continue to occupy the premises upon payment of the monthly rent to the bank. On this basis he made the order detailed above against the tenant and the Ghana Bank jointly and severally for damages, mesne profits and recovery of possession of the premises by the purchaser.

In the Ghana Court of Appeal Van Lare J.A. delivered a judgment with which the other two members of the court agreed. That judgment contains the following statement of the law relating to the position of a purchaser under the execution of a fi. fa., which appears to their Lordships to be wholly correct: "The law "is clear that a purchaser of a property under the execution of "a fi. fa. steps into the shoes of the judgment debtor by pur-"chasing no more than the 'estate' of the judgment debtor "therein. In other words what is sold and what is bought at a "sale in execution is the right, title and interest of the judgment-"debtor—*Dadzie* v. *Kojo*.[1] It follows therefore that if a certain "property which is attached under execution by way of fi. fa.

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[1] (1940) 6 W.A.C.A. 139.

"turns out to be in any way encumbered the purchaser buys "subject to that charge or encumbrance."

The learned J.A. went on to say that the case would have taken a different turn had Barclays still remained at the date of sale the party interested in the encumbrance, thereby, as it seems to their Lordships, indicating the view that, in accordance with his statement of the law as quoted above, Barclays, had they retained the equitable mortgage, could have enforced it against the property in the hands of the purchaser.

Nevertheless, the learned J.A. went on to conclude that the appeal should be dismissed, it would seem on the grounds that Barclays ceased to have any interest in the property on being paid off by the Ghana Bank on October 27, 1954; that there was no formal assignment of Barclays' interest to the Ghana Bank; that the legal mortgage given by the debtor to the Ghana Bank on October 27, 1954, was null and void by virtue of the provisions of Order 43 above referred to; and, accordingly, that the Ghana Bank had no interest, legal or equitable, in the property at the date of the execution sale.

Their Lordships agree that the legal mortgage of October 27, 1954, must be taken to have been null and void, and are unable to accept the submission made by Mr. Quass to the effect that the legal mortgage should be related back to the date of the equitable mortgage on the ground that it was merely an implementation of the debtor's undertaking contained in the latter document to execute a legal mortgage when required to do so by Barclays. It appears to their Lordships that the legal mortgage was on the face of it intended to constitute a new and distinct security. But this by no means compels the conclusion that the Ghana Bank did not become entitled to the benefit of Barclays' equitable mortgage on paying to Barclays on October 27, 1954, the balance owing on that security.

In their Lordships' opinion, it follows from their acceptance of Van Lare J.A.'s statement of the law as quoted above (to which may be added a reference to the observations of Lord Chelmsford in *Wickham* v. *New Brunswick and Canada Railway Co.*[2]) that the attachment of September 25, 1954, took effect subject to Barclays' interest as equitable mortgagees.

It furthermore appears to their Lordships that, being outside the ambit of the attachment, the benefit of Barclays' equitable mortgage continued after September 25, 1954, to be capable of assignment or devolution, whether by express disposition or by operation of law or by the application of equitable principles, just as it would have been if the attachment had never taken place.

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[2] (1865) L.R. 1 P.C. 64, 75, 76.

The case thus turns upon the question whether the payment by the Ghana Bank to Barclays on October 27, 1954, of the amount then owing on the security of Barclays' equitable mortgage had the effect of entitling the Ghana Bank to the benefit of the equitable mortgage with the like priority over the purchaser's interest as it had possessed in the hands of Barclays at the date of such payment off.

It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see *Butler* v. *Rice*.[3]

In the present case it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention. Their Lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced: see *Butler* v. *Rice* [3] and *Chetwynd* v. *Allen*.[4] Their Lordships would add that if it is legitimate to look at the abortive legal mortgage for this purpose, the view they have formed as to the Ghana Bank's intention finds some support from the terms of the ultimate paragraph of that document, to which reference has already been made.

Their Lordships accordingly hold that by paying the amount due to Barclays the Ghana Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured as had theretofore been enjoyed by Barclays.

But this conclusion gives rise to consequential questions which were not fully argued before their Lordships, and cannot be adequately dealt with in the present appeal, in view of the form of the proceedings and the absence of evidence as to the amount which can properly be claimed to be due to the Ghana Bank on the security of the equitable charge in priority to the purchaser's interest. For example, it seems to their Lordships open to question whether the equitable charge could rank as security in the hands of the Ghana Bank for any greater sum than the amount owing upon it to Barclays at the date of the attachment or at the date of the payment off of Barclays by the Ghana Bank, whichever was the less. It also seems to their Lordships that the possible bearing on the question of priority of any payments made into or out of the debtor's account between acquisition of the benefit of the equitable charge by the Ghana Bank on October 27, 1954, and the execution sale on April 16, 1955, would require consideration.

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[3] [1910] 2 Ch. 277, 282, 283.

[4] [1899] 1 Ch. 353.

The award of damages for trespass over and above the claim for mesne profits appears to their Lordships to be ill founded, and Mr. Khambatta Q.C., for the purchaser, said that in any event he would not seek to maintain it.

As to the claim for mesne profits against the Ghana Bank, in respect of the rent received by them from the tenant, this claim was allowed in the courts below on the footing that the Ghana Bank had no interest at all in the property. Their Lordships having now decided that the Ghana Bank are in fact interested as equitable mortgagees, it is clear that the Ghana Bank must account to the purchaser for all rent received by them from the tenant since April 16, 1955, in the ascertainment of the amount owing to the Ghana Bank on the security of the equitable mortgage, and their Lordships consider that a declaration to this effect should be substituted for the award of mesne profits so far as the Ghana Bank is concerned, provided they take proceedings to enforce the equitable mortgage within a reasonable time. As to the order for possession against the Ghana Bank, it would seem that the Ghana Bank as equitable mortgagees are prima facie not entitled to possession or receipt of the rents and profits except under an order of the court. This matter of possession as between the Ghana Bank and the purchaser will, their Lordships think, best be dealt with by a declaration to the effect that the purchaser is to be entitled as against the Ghana Bank to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in any further proceedings taken to enforce the equitable mortgage.

The tenant has not been represented in the appeal, but their Lordships see no sufficient justification for the order for possession and mesne profits made against him, which in their judgment cannot stand. The tenant must, however, pay all arrears of rent

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not accounted for by payment to the Ghana Bank. It is clear that if the Ghana Bank pay or account to the purchaser for the rent received by them in accordance with the present judgment, an order upon the tenant to pay the same rent in respect of the same period to the purchaser would in effect result in the purchaser receiving it twice over, which could not be right.

In all the circumstances of this somewhat unsatisfactory case it appears to their Lordships that the proper course to be taken will be as follows: (i) The judgments and decrees of the Land Court and the Court of Appeal should be discharged. (ii) The rent paid by the tenant to the Ghana Bank since April 16, 1955, should be taken to have been paid in or towards satisfaction of the rent payable by the tenant to the purchaser since the same date. As regards any rent not so satisfied the tenant should be ordered to pay the same down to the date of the commencement of the action and will thenceforth be liable for all further rent accruing during the continuance of the tenancy. (iii) It should be declared that as between himself and the Ghana Bank the purchaser is absolutely entitled to the premises, subject to the charge thereon created by the equitable mortgage of July 16, 1954, to the benefit of which the Ghana Bank became entitled on October 27, 1954. (iv) The Ghana Bank should be ordered to pay to the purchaser all rent received by them from the tenant in respect of the premises since April 16, 1955, but such order should be suspended for six weeks from the date of Her Majesty's Order in Council herein and should not take effect if the Ghana Bank within that period commence proceedings for the enforcement of the equitable mortgage and submit to account in those proceedings for the rent received as aforesaid. (v) It should be declared that as against the Ghana Bank the purchaser is entitled to possession or receipt of the rents and profits of the premises unless and until otherwise ordered in proceedings taken to enforce the equitable mortgage.

Their Lordships will humbly advise Her Majesty accordingly. Their Lordships make no order as to the costs of the proceedings below or of the present appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; T. L. Wilson & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)* INLAND REVENUE COMMISSIONERS . . APPELLANTS;

AND

HINCHY . . . . RESPONDENT.

1960
Jan. 11,
12, 14;
Feb. 18.

Revenue—Income tax—Penalty—"Treble the tax which he ought to be "charged"—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Power of remission—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

Judicial Precedent—Statute—Construction—Assumed construction for decision on different point—Whether binding.

Statute—Construction—Absurdity—Unreasonable or oppressive result—Lack of ambiguity—Tax penalty.

Statute—Construction—Consolidating Act—To be construed against background of previous sociology—Savage tax penalty—Relevance of provisions consolidated.

Statute—Construction—Same words used in other provisions—Tax penalty.

Statute—Construction—Punctuation—Acts before 1850*—Irrelevance Modern Acts* (post, p. 765).

Statute—Construction—Different language of different provisions—Relevance—Incongruous provisions lumped together (post, p. 766).

The respondent, in making a return of income for the year ending April, 1952, stated that interest from his Savings Bank deposits amounted to £18 6s. In fact the interest was £51 5s. 9d., and after that was discovered an assessment was made on him. The tax on the amount understated was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 15, 1956, claimed £438 13s. 6d. for penalties, being treble the total amount of tax payable by the respondent in respect of the tax year 1952–53, plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver . . . a true "and correct . . . return which he is required under the preceding "provisions of this Chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 and treble "the tax which he ought to be charged under this Act. . . ."

The Crown contended that "the tax which he ought to be charged "under this Act" meant the whole tax chargeable for the relevant year without deduction of P.A.Y.E. payments but excluding tax deducted at source by those who paid dividends etc. and surtax:—

Held, (1) that the liability to the penalty must arise when the offence was committed, i.e., either, where no return has been made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the proper officer of the Revenue (post, pp. 760, 771, 775).

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* *Present*: VISCOUNT KILMUIR L.C., LORD REID, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

(2) That the words of section 25 (3) are not ambiguous and cannot mean anything but treble the whole tax which ought to be charged for the relevant year (post, pp. 763, 769, 775, 781).

Attorney-General v. *Till* [1910] A.C. 50; 26 T.L.R. 134 applied.

Quaere, whether surtax should be excluded from the computation of that whole tax (post, pp. 765, 776, 777, 782).

Decision of the Court of Appeal [1959] 2 Q.B. 357; [1959] 3 W.L.R. 66; [1959] 2 All E.R. 512 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Ormerod and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 11, 1959, allowing in part an appeal by the appellants, the Commissioners of Inland Revenue, from a judgment of Diplock J. given on December 2, 1958, on the trial of an action for penalties under the Income Tax Act, 1952, brought by the appellants against the respondent, Albert Edwin Hinchy, in the Queen's Bench Division of the High Court. By the judgment of Diplock J. it was adjudged that judgment should be entered for the appellants for the sum of £20 without costs, and by the order of the Court of Appeal the judgment was varied by substituting a judgment in favour of the appellants for £62 15s. in lieu of the judgment for £20.

The facts, stated by Lord Keith of Avonholm, were as follows: The respondent filled up the prescribed form containing a return of income and claim for allowances. The return, which was in respect of the income tax year 1952–53, was dated April 19, 1952. It disclosed as arising in the year ended April 5, 1952, untaxed interest on accounts and deposits in banks, including Post Office and other savings banks, of £18 6s. 0d. In fact the Post Office Savings Bank interest credited to the respondent and his wife in that year was £51 5s. 9d. After several years' correspondence an assessment was made, on November 30, 1955, of £30 in respect of untaxed interest, tax on which at 9s. 6d. in the pound came to £14 5s. 0d. This amounted to tax on the whole £51 of Post Office Savings Bank interest, for £21, part of his personal allowance, was deducted from the £51, leaving a net sum of £30. On March 9, 1956, a Schedule E assessment was issued, in respect of the respondent's employment, amounting, after allowances, to £427, on which tax was computed of £125 6s. 6d. These two assessments, apart from some Schedule A assessment, otherwise settled by allowances, constituted the respondent's whole tax liability for the tax year 1952–53. Liability in respect of a Schedule E assessment was computed on income arising in the tax year and was subject of direct assessment. It was not income from which tax was deducted at the source. The liability in respect of the savings bank interest, on the other hand, fell to be computed on the income arising in the preceding year, 1951–52. The respondent's total liability to tax for the year 1952–53, as so assessed and charged, was thus £139 11s. 6d., the sum of £14 5s. 0d. and £125 6s. 6d. The next material date was June 13, 1956, the date of issue of the writ for penalties. The claim made by the writ was for £438 14s. 6d., being penalty, under section 25 (3) of the Income Tax Act, 1952, of £20 and treble the tax on £139 11s. 6d.

Sir Reginald Manningham-Buller Q.C., A.-G., John Pennycuick Q.C. and *Alan Orr* for the appellants. The only question is the meaning of "treble the tax which he ought to be charged "under this Act" in section 25 (3) of the Income Tax Act, 1952. It is the sum for which the respondent had to be sued if he was sued at all. The case is important because (a) if the Court of Appeal was right the Revenue has been following the wrong practice for over a century, and (b) it is essential that the Income Tax Acts should be revised and, for that purpose, the meaning of these words must be decided in the House of Lords now, for if the revision were made on the basis of the Court of Appeal's decision and it were later held to be wrong, the whole revision would be thrown out of gear.

Section 25 (3) (*a*) originates from section 55 of the Income Tax Act, 1842. The only change, so far as the commissioners are concerned, is the substitution of the word "tax" for "duty." The meaning of the relevant words is that the defaulter is liable for treble the total sum which he ought to be charged if assessed under the Act and not, in the case of an incorrect return, treble the tax due on the amount which he has failed to disclose; very different language would secure the latter result. In section 55 there is no reference to a true and correct list, declaration, statement or return.

The only case of any relevance on section 55 is *Attorney-General* v. *Till.*[1] In the Court of Appeal Cozens-Hardy M.R. and Fletcher Moulton L.J. thought the penalty inappropriate for an inaccurate return. The House of Lords reversed the Court of Appeal, but there was no direct reference to the views of the court below on the extent of the penalty. It is inconceivable that, if the Lords had thought that view wrong, they would not have said so. If they had thought that the liability imposed was only £20 plus treble the tax due on the sum not disclosed they would have made it clear, but they did not do so.

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[1] [1909] 1 K.B. 694, 697, 699, 700, 702, 706 (C.A.); 25 T.L.R. 342; [1910] A.C. 50, 54, 59–62, 70–72 (H.L.); 26 T.L.R. 134.

Liability to the penalty arises on the default either in sending in no return or in sending in an inaccurate one. Under section 55 of the Act of 1842 all the duty which ought to be charged had to be found out and multiplied by three. The same calculation must be made under section 25 (3) of the Act of 1952, which is intended to refer to all the tax which ought to be charged, not just to the tax on the income which should have been disclosed but was not. The liability to treble tax is always the same: see section 107 of the Income Tax Act, 1918, and *Attorney-General* v. *Johnstone*.[2] Section 23 (2) of the Finance Act, 1923, which reduced the penalty maintained in section 107 of the Act of 1918 to £20, is replaced by section 25 (3) of the Act of 1952.

The amount which a taxpayer " ought to be charged under " this Act " is the same whether he has made no return or an incomplete return. It does not depend on any action by the Revenue: see Simon's Income Tax, 2nd ed., p. 290, para. 417. There is no authority for the statement in Konstam's Income Tax, 12th ed., para. 383, which ignores *Till's* case.[3] It is not what the Act says. Before one can find out the maximum penalty one must find out what is the tax which the taxpayer " ought to be " charged under this Act." Assessment is the only way in which it can be finally determined; it quantifies the liability: see sections 35, 36 (2), 37 and 50 (2) of the Income Tax Act, 1952. In this case there was no appeal against the assessments, which are therefore final and conclusive as to the tax which the respondent should be charged for the year 1952–53.

The conclusion that liability arises at the time of default and that quantification of the liability is by assessment is supported by the Irish case of *Attorney-General* v. *White*.[4] Failure to appeal against the assessment makes the amount final and conclusive.

Section 25 (3) of the Act of 1952 refers to " the preceding "provisions of this Chapter." See, therefore, sections 18 (2), 19 and 20, dealing with returns. Section 19 deals with the return by an individual of his previous year's income from all sources.

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[2] (1926) 136 L.T. 31, 32.

[3] [1910] A.C. 50.

[4] (1930) Oct. 4, Hanna J.; (1931) March 8, Supreme Court (unrep.).

Section 20 deals with the return of the current year's chargeable income under the respective Schedules. The background of these two sections is the fact that by the Finance Act, 1927, super tax was replaced by surtax, a deferred instalment of the income tax of the preceding year. One result of that was that there was no need for separate returns for the two taxes: see section 43 (3) of the Act of 1927—now section 25 (1) of the Act of 1952—which provided that no person should be required to make more than one return annually of the sources of his income and the amounts derived therefrom. "Person" includes a company (which is not liable to surtax) as well as an individual, but it would be pointless to require companies, not liable to surtax, to return, for instance, dividends already charged to tax. Section 43 (1) of the Finance Act, 1927—the provisions of which are now contained in section 19 of the Act of 1952—required a true and correct return of all the sources of income and the amount derived from each source, and section 19 now provides the basis for income tax and surtax assessment. Section 20 of the Act of 1952 (containing the provisions formerly in section 100 of the Income Tax Act, 1918) deals with returns of profits requiring to be taxed.

Four sections of the Act of 1952, all of which impose duties, a breach of which involves penalties under section 25, are section 21 (section 53 of the Act of 1842), section 22 (section 21 of the Act of 1842), section 23 (section 50 of the Act of 1842) and section 24 (section 52 of the Act of 1842). In the same way a breach of the provisions of their predecessors involved liability to penalties under section 55 of the Act of 1842. The present penalty provision applies, as did its predecessor, to a wide range of offences, some serious, some trivial. Until 1923 the treble tax was only a ceiling; the matter was left to the commissioners. Ever since 1842 the penalties imposed for the same sort of conduct have been likely to vary enormously as between one person and another, both equally at fault. This was obvious at the time of *Till's* case [5] and *Johnston's* case.[6] The construction of section 25 (3) is one thing and cannot be affected because Parliament has applied it to sections to which, perhaps, it should not apply: see sections 30, 27, 28 (now repealed by section 44 (9) and Schedule V, Part I, of the Finance Act, 1956) and section 29.

Until 1923 the penalty of £20 and treble tax was the maximum; the commissioners could fix the penalty to suit the offence, but in 1923, when the penalty obtainable in an action was reduced from £50 to £20, treble tax was made recoverable

[5] [1910] A.C. 50.

[6] 10 T.C. 758.

in the courts. The words "not exceeding" were left out (section 23 (2) of the Finance Act, 1923). But this omission cannot affect the construction of the words "treble the tax [or duty] which he "ought to be charged under this Act." There has been speculation on the reason for the omission. Parliament may not have wished to put on the courts the burden of making a full investigation into the circumstances of every tax case.

In 1842 Parliament imposed a very heavy liability for all breaches of tax law and left it to the commissioners to decide what was appropriate. In section 25 (3) of the Act of 1952 the penalty is the same. Parliament may have deliberately fixed the penalty very high so as to be sure of penalising the worst cases, at the same time giving those charged with the duty of collecting the Revenue ample powers to avoid the scandal of fancy penalties: see sections 500, 55 and 25 (5) of the Act of 1952.

In 1842 when this liability was imposed the specific financial penalty was in many cases likely to be more important to a taxpayer than treble his total tax liability. Take a man with a professional or business income of £1,000 a year and £50 investment income untaxed and £200 investment income taxed at source, a man of substance. Until 1920, when there was a new system of allowances and deductions, there was no difference, whether he was a bachelor or a married man, with or without children. In 1855 the rate of income tax was 1s. 4d. in the £; in 1875 it was 2d. These rates represented the high and the low watermark of income tax in the eighteen-fifties and eighteen-seventies. At those rates the tax on the income supposed would be, respectively, about £55 10s. and £6 18s. 10d. Thus, the treble tax did not then attain astronomical proportions, whereas in 1952–53 the same income would give rise to a liability of £217 in the case of a bachelor, £174 5s. in the case of a married man and £93 10s. in the case of a married man with two children. Nevertheless, the increase cannot alter the meaning of the words.

The change to treble tax in section 48 (1) of the Act of 1952 (corresponding to section 178 of the Act of 1842) is in words having the same meaning as those in section 25 (3). Section 25 (3) cannot be read as containing the proviso which is in section 48 (1). In paragraph 4 of Schedule VI the provision for "treble "the tax in respect of all the sources of his income" has been interpreted as including tax deducted at source: *Lord Advocate* v. *M'Laren.*[7]

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[7] (1905) 7 F. 990–991, 992–993, 994; 5 T.C. 110, 112–113, 114–115, 116.

The language and meaning of section 25 (3) are plain and difficulty only arises if one tries to give them a special meaning to lessen their impact on some of the cases to which they apply. It is true that the court has no discretion; Parliament has left that with the commissioners: section 500. It is highly improbable that penalty proceedings would be started for an understatement or overstatement of £1. If the taxpayer discovers his mistake he can avoid all liability to penalty by recourse to section 55 (1). The Revenue has never claimed that the surtax liability should be trebled, and it is only since the consolidation Act of 1952, when the charge to both income tax and surtax was consolidated into one Act, that for the first time it could be argued that the words "under this Act" include surtax. The wide powers of the Revenue and the Treasury to mitigate the penalties are a recognition that the courts may be required to give judgment for a larger penalty than would appear to be fair.

Section 25 (like its predecessor) applies to many cases where the person making the return has fully disclosed his whole income: see section 23 (lists of lodgers and inmates), section 27 (lists of employees) and section 29 (bank's untaxed interest). If the decisions below are right the penalty for breach of these provisions, however serious, can only be £20. Parliament could not have intended that.

Assessment is essential to quantify the penalty. The court cannot assess the tax liability and, if it did, that would not be binding on the commissioners. If on a subsequent appeal to the commissioners the assessment was reduced below the court's figure the penalty would then have exceeded three times the tax which the taxpayer ought to be charged.

In the case of fraud the Revenue could use section 48, but it is far simpler to use section 25 (3) and paragraph 4 of Schedule VI, and not to undertake the burden of proving fraud. Thus, section 48 is rather a piece of dead wood.

The offence is committed when the time for making the return has expired without a return having been made or when a false return is made. Immediately there arises, and since 1842 there has arisen, liability to treble the tax or duty which the taxpayer ought to be charged under the Act. If one asks what ought to be charged under the Act, one expects to be told the total liability. That answer is not affected by the fact that an assessment could be made on some of the income which the taxpayer has disclosed. An assessment can be made when there is no return at all. There is no logicality in the penal code. The other sections are no safe guide to the construction of section 25 (3), which should be considered by itself. The meaning of the phrase "tax he ought to be charged under the Act" has not changed since 1842. It did not change in 1923. The words must have the same meaning as in section 18 (2) of the Act of 1952, where they could not mean the difference between the taxpayer's total liability and his liability on the income which he has disclosed, because that section is dealing with the case where no return at all has been made. So the answer to the question, what ought X to be charged under the Act of 1952? is simply the total sum which he is liable to pay on assessment. It is true that this view produces anomalies, but there are bound to be anomalies, whichever way the case is decided.

When an incorrect return has been made, there are three possibilities in relation to the assessment: (1) The taxpayer may be assessed on his return before it is found to be incorrect. (2) He may be assessed on a different figure from that shown on his return. (3) He may not be assessed at all on his return because (as in the present case) the inspector before assessing him may have made inquiries. Thus, assessment has no effect on the quantum of the liability which arises on default to render a true and correct return. The proviso to section 48 (1) of the Act of 1952 operates if there has been an assessment; if the Court of Appeal is right that proviso must be read into section 25 (3).

The Court of Appeal was greatly affected by the anomalies which it considered would arise on the application of the Crown's contentions to the provisions of sections 21, 22, 27 and 29 of the Act of 1952. But, as against this, there is the meaning of the phrase in question; it is capable of only one meaning.

The history of the provision in question starts with section 55 of the Act of 1842. In *Till's* case[8] it was held that it applied to a failure to deliver a true and correct return. Since 1918 that cannot be challenged. The penalty, though severe, is not so severe as to compel the rejection of the natural meaning of the phrase in question, especially having regard to the powers of mitigation. Compare the wording of section 441 (4) of the Act of 1952 and section 111 of the Income Tax Act, 1806.

It is a possible construction of section 25 (3) of the Act of 1952 and section 55 of the Act of 1842 that it is to be inferred that the liability to treble tax only arises in relation to a return of income by a person chargeable to tax and is then three times the tax liability chargeable to him in that capacity.

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[8] [1909] 1 K.B. 649; [1910] A.C. 50.

There are three possible views: (a) that treble tax means what the Crown says it does and applies to these provisions; (b) that it means what the Crown says, but only applies when the defaulter is making a return of income and in some capacity is chargeable to tax and then three times his tax liability in that capacity; (c) that "tax which he ought to be charged under this "Act" means something less than his total liability to tax, which would involve writing something into section 25 (3) which is not there, something like the proviso to section 48, a thing not permissible because it would amount to legislating. As to the second possibility mentioned, under section 21 of the Act of 1952, dealing with returns by persons acting for others, the person making the return is chargeable, and "treble the tax he ought "to be charged under this Act" means treble the tax he ought to be charged in that capacity. Under sections 22, 23, 27 and 29 there is no chargeability.

It is not possible to fit the penalty sections into a logical pattern, but some help can be got from sections 18 and 49 (2) and paragraph 4 of Schedule VI and by comparison with sections 48 and 49 (1). The tax which X ought to pay under the Act of 1952 in any one year must be his total liability. If one were construing section 18 alone, that is the only conclusion one could reach. The meaning must be the same in both the sub-paragraphs of section 25 (3): see also section 107 of the Act of 1918 (both before and after the amendment in 1923) and section 55 of the Act of 1842. When properly construed, the words are capable of only one meaning. The meaning given them by the Court of Appeal in this case amounts to a rewriting. That is not right.

Liability to pay treble the tax which he ought to be charged under the Act only arises when the defaulter is either personally or in some specified capacity chargeable to tax, and then the sum to be trebled is that for which he is properly chargeable in that capacity.

The Revenue practice has not been challenged till now: see *Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan*[9] and *Income Tax Special Commissioners* v. *Pemsel.*[10]

John Pennycuick Q.C. following. Section 23 (3) of the Act of 1952 should be given its natural construction. Under section 19 the obligation on the taxpayer is to perform a single act, to deliver a true and correct return in the prescribed form of all the sources of his income—a single act which he either performs or fails to perform. If he fails to perform it, he is liable to the penalty. There is no question of partial performance: see *Till's* case.[11] The penalty depends, not on the nature of the default but on the terms in which the penalty itself is prescribed—" treble " the tax which he ought to be charged under this Act." These words are capable of only one meaning; they denote treble the whole of the income tax to which the defaulter is chargeable by direct assessment for the year of assessment in question. The Court of Appeal took the view that the words were capable of a different interpretation.[12]

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[9] [1934] A.C. 1, 11 (H.L.); 49 T.L.R. 566.

[10] [1891] A.C. 531, 590–591 (H.L.); 7 T.L.R. 657.

One basis which the Court of Appeal seems to suggest is that one must take the point of time when the assessment has been made, see what assessment has been made and calculate the penalty on the amount of the income which has remained unassessed by reason of the incorrect return. But it is only after the return has been made and considered that the commissioners make the assessment for the year of assessment, and if the true view is that " the tax which he ought to be charged under the " Act " is the tax not yet assessed at the date of the default, the words would refer to the whole tax for that year. The offence of the taxpayer was committed once and for all.

But the Court of Appeal apparently intended to indicate as the proper basis for the computation of the penalty, the tax appropriate to the undisclosed income, the tax referable to the income omitted from the return. If there were no allowances and reliefs, and tax were at a flat rate, that might be workable. But if the view of the Court of Appeal was right, it would have been properly expressed in a statute by a provision to the effect that the penalty was to be " treble the excess of the tax chargeable " on the basis of a true and correct return over the tax charge- " able on the basis of the return actually delivered." But those words cannot be written into section 25 (3). To do so would not be to construe the section. The courts are not entitled to read words into an Act: see *Vickers, Sons & Maxim Ltd.* v. *Evans.*[13] Where there is an ambiguity the court will prefer a meaning which does not produce oppressive results, but if the words are not ambiguous the court must give effect to them. Before the court can read into an Act words which are not there, it must be satisfied that something which was intended to be included has been left out, and also it must be satisfied what that something is. This requirement is not satisfied here.

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[11] [1910] A.C. 50.

[12] [1959] 2 Q.B. 357, 377, 378; [1959] 3 W.L.R. 66; [1959] 2 All E.R. 512.

[13] [1910] A.C. 444, 445; 26 T.L.R. 548.

Section 25 (3) should be contrasted with section 48 where one is looking back, whereas here one is looking forward.

The respondent did not appear and was not represented.

Their Lordships took time for consideration.

February 18. VISCOUNT KILMUIR L.C. My Lords, this is an appeal from an order of the Court of Appeal (Lord Evershed M.R., Ormerod and Harman L.JJ.) in England, allowing in part an appeal by the appellants from a judgment of Diplock J. on the trial of an action for penalties under the Income Tax Act, 1952. Diplock J. held that judgment should be entered for the appellants for the sum of £20 without costs, while the Court of Appeal substituted a judgment in favour of the appellants for £62 15s. The Court of Appeal thus added to the sum of £20 treble the tax on the amount which would have escaped taxation had a return made by the respondent formed the basis of assessment.

The facts are that on April 19, 1952, the respondent filled up the prescribed form containing a return of income and claim for allowances for the income tax year 1952–53. In that return he set out the figures of £18 6s. as the bank interest. In fact the correct amount of his income from that source in the year ending April 5, 1952, was £51 5s. 9d.

In order to appreciate the basis of the judgments of the courts below it is material to observe that no assessment was ever made on Mr. Hinchy on the basis of his incorrect return, that the only assessment made on him for the relevant year was made after the correct amount had been discovered, and that this assessment in respect of all the tax for which he was liable for that year was made before the issue of the writ on June 13, 1956.

These facts raise the question of the construction of subsection (3) of section 25 of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver, within "the time limited in any notice served on him, or wilfully makes "delay in delivering, a true and correct list, declaration, state- "ment or return which he is required under the preceding "provisions of this Chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 "and treble the tax which he ought to be charged under this "Act; or (*b*) if proceeded against before the General Commis-"sioners, forfeit a sum not exceeding £20 and treble the "tax which he ought to be charged under this Act, and where "he is proceeded against before the General Commissioners, the "penalty shall be recovered in the same manner as any other "penalty under this Act, and the increased tax shall be added "to the assessment."

The argument for the Crown which was developed before Diplock J., and later before the Court of Appeal, may be summarised as follows: The penalty imposed by the said section 25 (3), in the case of proceedings by action in a court, is a fixed penalty which the court (unlike the General Commissioners, in proceedings brought before those commissioners) has been given by the legislature no power to mitigate but which the Commissioners of Inland Revenue or the Treasury may mitigate under section 500 of the Act. The said penalty has been applied by the legislature to a very wide variety of defaults. It embraces cases in which no return has been delivered at all, cases in which an incorrect return has been delivered, and cases (as under section 27, requiring the delivery by employers of lists of their employees) where a duty is cast upon one person to deliver a document relating to the tax liability of another, and where default in performing such duty can have no bearing on the ascertainment of the defaulter's own liability to tax. It applies irrespective of whether there has been fraud on the part of the defaulter and to cases in which there has been a serious, trivial, or even no direct, loss of tax to the Revenue. But the penalty applied to all these cases is a single penalty, and on the true construction of the relevant words in section 25 (3) (which must, it was submitted, be given the same construction as the corresponding words applied to proceedings before General Commissioners in section 55 of the Income Tax Act, 1842) such penalty is a penalty of £20 and treble the total tax to which the defaulter is chargeable by direct assessment for the year of assessment in question; the words "ought "to be charged" limiting the ambit of the penalty to such tax as could be directly assessed on the defaulter, and there being in this respect a material difference in the wording of section 25 (3) and the wording "treble the tax chargeable in respect of all the "sources of his income" of paragraph 4 of Schedule VI of the Income Tax Act, 1952. It was further contended that the penalty could not be made to work in all the cases to which it is made applicable if it were construed as limited to treble the tax avoided by the default; and that if the legislature had intended the subsection to bear this meaning it would have used the phraseology to be found in section 48 of the Act. The Crown's construction of the words had not, so far as was known, ever been challenged in the period of over a century which had elapsed since the enactment of the Income Tax Act, 1842.

Diplock J. took the view that the consequence of the construction of section 25 (3) contended for by the Crown seemed to him to be absurd and unjust, and if there was some other possible construction, consistent with the words, which led to results less absurd and unjust, he would be inclined to adopt it. In his view, there was such an alternative construction, for it seemed to him that a reasonable meaning of the words "the tax which he ought "to be charged under this Act" was the tax to which the taxpayer ought to be duly assessed, but to which he had not been duly assessed by reason of the default; that is to say, the increased tax which, when one looked at the latter part of the subsection, was to be added to the assessment. In this respect he thought that section 48 of the Income Tax Act, 1952 (dealing with penalties for fraud), expressed in clearer and lengthier language what was intended to be conveyed by the elliptical expression in section 25 (3).

This construction raised the question of determining at what point of time one must ascertain the amount of tax which the taxpayer ought to be charged, and Diplock J. gave the answer of the date at which the proceedings, whether before the court or the General Commissioners, are brought. As, therefore, in the present case the proceedings had been commenced after the respondent had been charged with all the tax for which he was liable, there was at the date of the commencement of the action no tax with which he ought to be charged under the Act, and the only amount recoverable was the fixed penalty of £20.

Like the Court of Appeal, I regret that I am unable to accept this view as to the point of time. Its result would be that if the error were discovered before the assessment was made, the making of the correct assessment would eradicate that portion of the penalty arrived at by multiplying the tax. I cannot accept this. The liability to the penalty must, in my view, arise when the offence is committed, that is, when no return is made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the commissioners.

The Court of Appeal did, however, approve of the antecedent reasoning of Diplock J. and the gist of their view is expressed in the following quotation[1]: " So, as a matter of English, it seems " to us at least a legitimate interpretation of the phrase ' tax " ' which he ought to be charged ' to limit its significance to that " amount of tax with which, at the relevant point of time, the " taxpayer ought to be charged but with which he has not been " charged by reason of his defective return: in other words, the " tax appropriate to the undisclosed income."

The difficulty of the view of the Court of Appeal is that this expression appears to predicate that there has been an assessment by which the taxpayer has been charged with the lesser amount by reason of his defective return, and that this forms the basis of the penalty under section 25. It is unfortunate that the Court of Appeal do not seem to have appreciated that there had been no assessment on the respondent on the basis of the incorrect return which could play its part in the quantification of the penalty. In this case, as in many others, there is not, to use the language of the Court of Appeal,[1] " tax . . . with which he [the taxpayer] " has not been charged by reason of the defective return." He has not been charged because the time for charging him has not yet arrived. When that time does come, non constat that the return will have any causative effect on his assessment. The latter may be based on other information, and in the case of income under Schedule E must be based on his income in the current and not the past year. It is an essential constituent of this problem that at the time of the commission of an offence under section 25, assessment may be in the future whereas, under section 48 (the fraud section), assessment must be in the past.

Nevertheless, although the concluding reasoning of the Court of Appeal does not, in my opinion, fit the facts of this case or the general procedure of taxation, it would be wrong to ignore what the Attorney-General termed the " underlying thought of that " judgment." They considered that the penalty provisions produced minimum penalties wholly unrelated to the extent of the default, so extravagant as to be shocking in a final provision, and at least one anomaly which might well be thought to run quite contrary to ordinary justice. They considered that the penalties were so unfair and unjust and contained variations so numerous and illogical as to produce, in their view, the result that no safe view could be got, from other sections of the Act, in the attempt to construe section 25. Although they did not use the words of Lord Loreburn in *Attorney-General* v. *Till*,[2] that the penalties were "unreasonable or oppressive," yet they clearly considered them to be of that nature. I asked Mr. Pennycuick what was his submission as to the law which should guide the court in construing provisions which appeared to be oppressive and unreasonable. His answer was that if there were any ambiguity the court would prefer that construction which did not lead to an oppressive and unreasonable conclusion, but if the words were clear, then they had to be given full effect whether or not that effect was unreasonable or oppressive. He submitted that there was no ambiguity in this case.

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[1] [1959] 2 Q.B. 357, 378; [1959] 3 W.L.R. 60; [1959] 2 All E.R. 512.

Bearing this in mind and also the fact that the respondent was not represented, I have tried to formulate an argument implicit in the words of the section. I remind myself that the effect of the decision of this House in *Attorney-General* v. *Till*[3] was to rewrite this section in the sense: " A person who neglects to " deliver any return or who delivers a return which is not correct " is liable to the penalty." As the section can look to the future, can the words creating the penalty be extended distributively and respectively so that the penalty becomes the sum of £20 and treble the whole tax which he ought to be charged under this Act where he neglects to deliver a return, and in the case of an incorrect return, the sum of £20 and treble the tax on the amount which would have escaped taxation if the incorrect return made by the respondent had formed the basis of assessment? I cannot give this meaning to the words. So to do would entail the making of an artificial assessment on the basis of the return, the making of the true assessment and the subtracting of the one from the other. I do not pause to speculate on the hypothetical difficulties of policy and procedure which might arise. I am content to say that to add the necessary words would, in my opinion, be legislation and not construction.

I also tried to consider whether, on the assumption of an ambiguity, I could gain assistance from the fact that the element of treble tax was attached to penalties after proceedings in court, by section 23 (2) of the Finance Act, 1923, which also changed the penalty for abettors of fraud in what is now section 48 of the Income Tax Act, 1952. Again I could find nothing to drive me to a recondite secondary meaning. I cannot ignore the fact that a multiplier of the tax with which he ought to be charged was made a constituent of the penalty for the equivalent of this offence by section 118 of the Act of 1805. I cannot believe that, in the year of Trafalgar and Austerlitz, Parliament was considering such a refinement as the present argument entails. The more, however, I consider the piecemeal additions of the last 150 years, the more glad I am of the assurance of the Attorney-General that the penalties are being reconsidered.

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[2] [1910] A.C. 50, 52; 26 T.L.R. 134.

[3] [1910] A.C. 50.

Moreover, although the present point was not argued, it was assumed that "treble the tax which he ought to be charged under "this Act" meant treble the whole tax for the relevant year by two members of the Court of Appeal[4] and by Lord Atkinson in *Attorney-General* v. *Till*,[5] by Rowlatt J. in *Attorney-General* v. *Johnstone*,[6] inferentially by the Court of Session in *Lord Advocate* v. *M'Laren*[7] and by the High Court and Supreme Court of what was then the Saorstat Eireann in the unreported case of *Attorney-General* v. *White*.[8] It is impossible, in my view, to give the words a different meaning in that part of the subsection which applies to proceedings before the commissioners from that which applies to proceedings in court, although in the case of the commissioners it is a maximum and not a fixed penalty.

I have, therefore, come to the conclusion that the words must bear their ordinary meaning and that this appeal must be allowed.

At the request of the Revenue there will be no order for costs.

LORD REID. My Lords, if the appellants, the Commissioners of Inland Revenue, are right in their main contention, any taxpayer who makes a mistake in his annual income tax return and has not discovered and rectified it must, if he is sued, be subjected by the court to a penalty of £20 and treble the whole tax which he ought to be charged for the year; that penalty is in addition to the tax which he normally has to pay. It does not matter how innocent the mistake may have been or how large the penalty may be, the court has no power to modify or reduce the penalty, although such a penalty, with the modern rates of income tax, would be ruinous to most taxpayers with moderate or large incomes. The commissioners maintain that the only remedy lies with them, and that it is for them in their sole and unfettered discretion (unless the Treasury choose to interfere) to determine what they think would be a proper penalty in each case and to reduce the penalty imposed by the court accordingly.

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[4] [1909] 1 K.B. 694; 25 T.L.R. 342.

[5] [1910] A.C. 52.

[6] (1926) 136 L.T. 31, 32.

[7] (1905) 7 F. 984; 5 T.C. 110.

[8] (1930) Oct. 5, Hanna J.; (1931) March 8, Supreme Court (unrep.).

The commissioners have, in fact, exercised this power for a long time, and it is no doubt a tribute to the way in which they have exercised their discretion that this appears to be the first time that the extent of their power has been challenged in court, and that it has been possible to delay for so long the revision of the penalty provisions in the Income Tax Acts, although the need for such revision had long been evident.

The incongruities and anomalies in these penalty provisions have a very long history. Some had their origins in the Income Tax Acts of 1799, 1803 and 1806, and even in the Act of 1842 there were already serious anomalies. But in those days the rate of tax was low and penalties based on the total amount of tax payable were probably not oppressive. And this is not the only chapter of the law in which ill-conceived provisions introduced by temporary Acts with limited application have long survived without any radical revision and have to be applied in circumstances very different from those which existed at their origin.

This case turns on the proper construction of section 25 (3) of the Income Tax Act, 1952. [His Lordship read the subsection and continued:]

In a somewhat similar provision in the Act of 1799 the penalty was simply £20. Then, after some amendments, the Act of 1842, section 55, provided: "And be it enacted, that if any person who "ought by this Act to deliver any list, declaration or statement "as aforesaid shall refuse or neglect so to do within the time "limited in such notice, or shall under any pretence wilfully delay "the delivery thereof, and if information thereof shall be given, "and the proceedings thereupon shall be had, before the commissioners acting in the execution of this Act, every such person "shall forfeit any sum not exceeding £20, and treble the "duty at which such person ought to be charged by virtue "of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable, and the increased duty "to be added to the assessment, . . . ; and every person who "shall be prosecuted for any such offence by action or information in any of Her Majesty's courts, and who shall not have "been assessed in treble the duty as aforesaid, shall forfeit the "sum of £50."

In the Act, as printed by the Queen's Printer, there is a comma after £20 in the passage "shall forfeit any sum not exceeding "twenty pounds, and treble the duty. . . ." An argument was submitted that this comma showed that "not exceeding" only governed "£20" and did not apply to "and treble the "duty," so that the General Commissioners only had power to reduce the £20 and had no power to reduce that part of the penalty which consisted of treble duty. But before 1850 there was no punctuation in the manuscript copy of an Act which received the Royal Assent, and it does not appear that the printers had any statutory authority to insert punctuation thereafter. So even if punctuation in more modern Acts can be looked at (which is very doubtful), I do not think that one can have any regard to punctuation in older Acts. And omitting the comma I would hold that the whole of the penalty was subject to modification under the Act of 1842. There is now no comma in section 25 (3) (*b*) and, in my view, if proceedings are now taken before the General Commissioners they are entitled to reduce the penalty of treble tax.

In 1842, if the matter was taken before a court there was a fixed penalty of £50: with the low rates of tax then in force £50 was presumably thought at least comparable with £20 plus treble tax. Under the Act of 1918, section 107, the penalty which a court could impose was still only £50, but the rise in the rates of income tax made that an inadequate penalty in many cases, and the provision which now appears in section 25 (3) (*a*) was introduced by the Finance Act, 1923, s. 23 (2).

Before dealing with the crucial question in this case, the proper construction of section 25 (3) (*a*), there are several matters which it may be convenient to deal with at this stage. The appellants submitted that this subsection is governed by section 25 (2), so that it only applies if the return or other statement was not true and correct to the best of the judgment and belief of the person making it. We were informed that the commissioners never take action under this section unless they think that the declaration required by subsection (2) was not truly made, but I can find no basis in law for it being a defence to an action to prove that the return or statement was made to the best of the judgment and belief of the defendant. The offence is not delivering a true and correct return, and if, in fact, it is not true and correct, the penalty follows as a matter of course.

Then it was said that whatever be the true meaning of "the "tax which he ought to be charged under this Act," it cannot include either surtax or tax deducted at source by those who pay dividends, etc. It is not necessary to decide those matters in this case, and I will only say, particularly with regard to surtax, that

I am not convinced that these are excluded, and that in any revision of this and other provisions this ought to be made clear.

In determining the proper construction of section 25 (3) one must bear in mind that the subsection applies to other things as well as a return of the taxpayer's own income: it applies to any list, etc., which he is required to deliver under a number of other sections. Under section 21 he may be required in certain cases to make a return of another person's income and to submit to being charged to tax in respect of it. Under section 22 he must render a statement of money received by him on behalf of another person. Under section 23 he must deliver a list of lodgers and inmates of his dwelling-house. And section 30 applies the provisions of section 25 to lists of employees (section 27), and commissions (section 28), and interest paid to others (section 29).

I do not propose to examine the other penalty provisions in the Act of 1952. It is no doubt true that every Act should be read as a whole, but that is, I think, because one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act. But where, as here, quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these sections in light of another, I think that it would be just as misleading to base conclusions on the different language of different sections as it is to base conclusions on the different language of sections in different Acts. As an example of incongruity I need only refer to the admitted fact that the penalty in sections dealing expressly with fraud is less than the penalty under section 25 (if the appellants' construction of section 25 is right) for errors which may only be due to mistake.

I can now state what I understand to be the rival contentions as to the meaning of section 25 (3). The appellants contend that "treble the tax which he ought to be charged under this Act" means treble his whole liability to income tax for the year in question (less surtax and tax deducted at source, as I have already explained). It is not so easy to state the contrary contention briefly and accurately. Unfortunately, the respondent was not represented in this House. That was due to no fault of the appellants, and the Attorney-General very properly drew your Lordships' attention to points on which counsel for the respondent might have relied, but that is not altogether an adequate substitute for an argument for the respondent.

Broadly, the contention is that it cannot have been intended that that which would have been chargeable in any event on the inaccurate return which was sent in should enter into the computation of the penalty, that the penalty must have been intended to have some relation to the offence, and that the tax which he ought to be charged must be the additional tax which he ought to be charged by reason of the discovery of the true state of affairs. Otherwise the penalty will often be grossly and extravagantly disproportionate to the offences. A man might be properly chargeable to £5,000 tax on his actual return and properly chargeable to £5,100 tax on the correct return. If the appellants are right the penalty would be £15,320: if the other view is right it would only be £320. And even more extravagant cases could arise when the taxpayer's omission was not in respect of his own income. If he fails to return a correct list of lodgers or employees or money collected for or interest paid to others the penalty would have no relation to that failure—it would be treble his own income tax, although he had made a correct return of his own income and paid the full tax due on it. And an even more difficult case might arise under section 21: under that section he is chargeable both in respect of his own income and in respect of income belonging to another. If one of the returns which he makes is inaccurate is the penalty treble the whole tax which he ought to be charged, that is, the tax on both his own and the other income, or can something be read in, even if the appellants are right, so as to base the penalty on something less than the whole tax which he ought to be charged under the Act?

Difficulties and extravagant results of this kind caused Diplock J. and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

The Court of Appeal found it possible to adopt a secondary meaning for the crucial words. Their conclusion appears to be summed up in a sentence[9]: " So, as a matter of English, it seems

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[9] [1959] 2 Q.B. 357, 378.

"to us at least a legitimate interpretation of the phrase 'tax "'which he ought to be charged' to limit its significance to that "amount of tax with which, at the relevant point of time, the "taxpayer ought to be charged, but with which he has not been "charged by reason of his defective return: in other words, the "tax appropriate to the undisclosed income."

I agree with the Court of Appeal that if it is possible to infer the meaning which they attach to these words that should be done. One is entitled and indeed bound to assume that Parliament intends to act reasonably, and therefore to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret that I am unable to agree that this case leaves me with any choice. When I look at the way in which the provisions of section 25 (3) (*a*) were brought into the Income Tax Acts, and at the way in which those provisions must be applied in circumstances other than those contemplated by the Court of Appeal, I find myself unable to hold that the crucial words are capable of the interpretation which they have adopted.

The Act of 1952 is a consolidating Act, and one must presume that such an Act makes no substantial change in the previous law unless forced by the words of the Act to a contrary conclusion. Therefore, in interpreting a consolidating Act, it is proper to look at the earlier provisions which it consolidated. The previous law was contained in section 107 of the Income Tax Act, 1918, and section 23 (2) of the Finance Act, 1923, to which I have already referred. Section 107 gave the court no power to impose a treble tax penalty, and it did not require the General Commissioners to impose the maximum penalty; they could modify the penalty to any extent they might think just. The Attorney-General was unable to point to any provision in force before 1923 which required the maximum penalty to be imposed even in cases where there was no fraud: there were certain provisions imposing the maximum penalty if fraud was established. Section 23 (2) of the Act of 1923 is in the same terms as section 25 (3) (*a*) of the Act of 1952. If the appellants' construction is right, then Parliament imposed for the first time in 1923 an obligation to inflict the full treble tax penalty even on innocent though negligent offenders, and did this at a time when the rate of tax (then 4s. 6d.) made such a penalty oppressive in most cases.

It is so contrary to the practice of Parliament to commit in effect unlimited discretion to a branch of the executive as to the amount of penalties to be imposed on persons guilty of no more than negligence that I would not easily hold that this was made in 1923; but I am forced to the conclusion that this was then done, and it is idle to speculate whether Parliament, or, indeed, any member of Parliament, understood the full effect of the enactment. I refer to the appellants as a branch of the executive because section 1 of the Inland Revenue Regulations Act, 1890 (which does not appear to have been amended or repealed), provides that they "shall in the exercise of their duty be subject "to the authority, direction, and control of the Treasury, and "shall obey all orders and instructions which have been or may "be issued to them in that behalf by the Treasury." It is proper to add that the present practice appears to be to confine such orders and instructions within narrow limits.

I find it impossible to hold that the words "not exceeding "£20 and treble the tax which he ought to be charged under "this Act" in section 107 (1) (*a*) of the Act of 1918 meant anything other than treble the whole tax which he ought to be charged for the relevant year. The argument for the more limited meaning adopted by the Court of Appeal is based almost entirely on the extravagant consequences which flow from giving the words in the present Act their natural meaning. But that argument loses almost all its force when applied to the Act of 1918. Under that Act the General Commissioners, an independent body, had full discretion to modify the penalty, and all that could then be said was that, owing to the increase in the rates of tax, the maximum penalty had become so high as to be extravagant in the great majority of cases. But there was no obligation under the Act of 1918 to inflict the maximum penalty in cases where it was disproportionate to the offence.

In 1923 the same words were inserted in section 107 (1) (*b*) but with the omission of the vital words "not exceeding." Why these words were omitted I do not know, but their omission creates the present difficulty. Normally, it would be impossible to hold that, when the same words as those already in one subsection are later inserted in another subsection of the same section, they can be given a meaning different from the meaning of the words which were there already. I do not find it possible in this case to hold either that the words in the original Act of 1918 had a limited meaning, or that they were given a limited meaning by the Act of 1923, or that after 1923 the same words in subsection (1) (*a*) and (*b*) had different meanings: I cannot avoid the conclusion that these words did not have a limited meaning before 1952 and that, therefore, they do not have a limited meaning now when they are reproduced in the consolidating Act of 1952.

My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Radcliffe. I am in general agreement with it, and, in particular, I agree with his account of the methods of tax administration, and of the way in which this case has been dealt with, so I need not add further to my own speech, already perhaps too long.

In my judgment, this appeal must be allowed.

LORD RADCLIFFE. My Lords, in my opinion, we are bound to allow this appeal.

It has not been in dispute that in 1952 Mr. Hinchy committed a breach of the obligation imposed upon him by section 19 of the Income Tax Act, 1952. He did not, when required so to do, deliver to the inspector of taxes a true and correct return of all the sources of his income, and of the amount derived from each source for the year preceding the year of assessment, 1952–53. In fact, the signed return which he did deliver on April 19, 1952, stated incorrectly that his income for the year 1951–52 from interest on bank deposits, including Post Office and other savings bank deposits, had been £18 6s., whereas his true income from that source had been £51 5s. 9d.

Further, it has not been in dispute that by virtue of section 25 (3) of the same Act he thereby forfeited, if proceeded against in a court of law, the sum of £20 and treble the "tax which he ought "to be charged" under the Act. Such a forfeiture is imposed by the section upon anyone who "neglects or refuses to deliver, . . . "or wilfully makes delay in delivering, a true and correct . . . "return." It was decided by this House in *Attorney-General* v. *Till* [10] that a person who, though not failing to make a return at all, nevertheless makes an incorrect return is within the description that I have quoted above. I am bound to say, looking back, that I think that that decision might well have been otherwise and, if it had been, the problem that we are now faced with would not have arisen. But, since it went the way it did, we must now take it that Mr. Hinchy was a person who neglected to deliver a true and correct return.

The whole question, therefore, is what penalty is attached to his default by the words "the tax which he ought to be charged "under this Act."

The Revenue say that the meaning of these words is that the defaulter incurs, apart from the £20, a penalty of three times his

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[10] [1910] A.C. 50.

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total income tax bill in respect of all sources of income directly assessable for the year in which the offence is committed. They say that this is the way in which the words have been understood and applied ever since they first appeared in an Income Tax Act (the first use of them in this context was in section 118 of the Income Tax Act of 1805); that whenever their import has been noticed judicially, as in *Attorney-General* v. *Till* [11] in the Court of Appeal, and in *Attorney-General* v. *Johnstone*,[12] the same meaning has been attributed to them; and that the Income Tax Codification Committee itself, which in the years before 1939 laboured with so much intelligence and devotion to no eventual result, clearly assumed this to be the correct meaning. All this, I think, is true; and these considerations are persuasive. But, having regard to the extreme severity which might attend such a penalty under present scales of taxation, and the fact that in this very case the Court of Appeal have found it possible to impute another and less onerous meaning to the words, I think it better to approach the question of construction without giving any weight to this consideration that, if the Court of Appeal are right, they have discovered in the phrase a significance that has long lain unobserved, and so lain after many persons, it is fair to suppose, have had cause to scrutinise them with somewhat anxious attention.

What, then, are the alternative readings which have been suggested? Diplock J., before whom this action came in the High Court, took the view that (1) the point of time at which there should be ascertained the amount of tax which a defendant "ought to be charged" was the date of the initiation of the proceedings for the penalty, and (2), if at that date there had been a correct assessment on the full chargeable income, there was no tax with which it could be said that the defendant ought to be charged and nothing, therefore, recoverable except £20. In my opinion this view is wrong in its initial assumption. The date at which any penalty incurred is to be ascertained must be the date when the offence is committed: assessment or payment after that cannot affect the liability. Otherwise, every time, an error being detected, a correct assessment is made in order to determine the true tax liability for the year, the penalty by way of multiplied tax automatically disappears. I agree with the learned Master of the Rolls when he says in the judgment delivered in the Court of Appeal[13]: " We do not think that this can be right."

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[11] [1909] 1 K.B. 694.

[12] 136 L.T. 31.

In the Court of Appeal itself a different interpretation prevailed. It was based on the general idea that, when there has been an incorrect return, the tax which the maker of it " ought " to be charged " in treble is something which can be called the " excess tax." This is variously described as[13] " the tax which " the taxpayer ought to be charged and was not charged because of " his failure to make a true and correct statement of his income," and as[14] " that amount of tax with which, at the relevant point " of time, the taxpayer ought to be charged but with which he " has not been charged by reason of his defective return; in other " words, the tax appropriate to the undisclosed income."

My Lords, I do not think that the words of section 25 (3) which are in question give any hint of an intention to measure the tax penalty by a computed excess of this sort. It can be done if an appropriate formula is used. Section 48, for instance, does apply such a formula, where the conditions are such that an assessment, though an inadequate one, has been made. Again, section 49 allows treble the excess tax where a false return of Schedule D income has led to under-assessment or would have led to it if undetected. But no such formula is used or indicated in the section that we have to consider. Moreover, there is another and fundamental obstacle to the introduction of this " excess tax " idea which the Court of Appeal judgment imports into the meaning of the section. Their definition depends essentially on the existence of a first incorrect assessment, such as they believed to have been made in this case, which assessment can then be compared with the corrected true assessment which emerges when the full facts are known. We were assured by the Attorney-General in the course of his argument that in this case there had been no such assessment for 1952–53, and, as this misunderstanding contributed to the Court of Appeal's view of the admissible interpretation of section 25 (3), I think it necessary to set out exactly what did apparently happen, because, so far as I can see, the order of events followed here is as likely as not to be typical of the order that will be observed in any other case of untrue or inaccurate returns.

In April, 1952, Mr. Hinchy made a return purporting to set out all the sources of his income for the year 1951–52, and of the amount derived from each source. This return would afford, of course, valuable information for the purposes of the assessment to be made on him for the year 1952–53, though, in so far as the basis of assessment is the current year's income, not that of the preceding year, such a return can be informative only and there is no inherent connection between the figures it shows and the figures that should be used for the true assessment. It also affords, I suppose, a means of checking by its figures the assessments which have been made for the previous year on that year's current income.

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[13] [1959] 2 Q.B. 357, 377.

[14] Ibid. 378.

No assessment for 1952–53 was ever made on Mr. Hinchy on the basis of his statement that his income (I include in this the income of his wife) from savings bank interest for 1951–52 had been £18 6s. The only assessment that was ever made on him for 1952–53 was made after the true figures had been established. There was then an assessment for each schedule, Schedule D and Schedule E, under which he derived assessable income, and these assessments have been put in evidence. The Schedule D assessment on "untaxed interest" is not intelligible unless the Schedule E assessment is first looked at.

The Schedule E assessment relates directly only to Mr. Hinchy's income from his employment in H.M. Customs and Excise. But, owing to the practice of "coding in" for the purpose of P.A.Y.E. deductions, two small items of income which really belonged to Schedule D were taken into account (see Part III of the assessment form) for the purpose of arriving at the code number appropriate to the operation of P.A.Y.E. By this means £21 of the savings bank interest and £19 of "excess "rents" income were taken to reduce by £40 the £396 of allowances which would otherwise have been taken into account in allotting the P.A.Y.E. code number and, ultimately, in computing the Schedule E assessment. The result was that £21 of the untaxed interest was, in effect, taxed under Schedule E and recovered through P.A.Y.E.; and the deduction of £21 from the full amount of £51 "untaxed interest" in the Schedule D assessment is merely a recognition of this arrangement, designed to prevent the £21 from being taxed twice over. It does not mean that Mr. Hinchy's assessments, when they came to be made, were on anything less than the full sum of £51 for untaxed interest. Considering the way that the matter is dealt with in more than one letter in the correspondence exhibited, I do not wonder that the Court of Appeal took the facts to be otherwise. I still do not know why the figure of £21 was taken for the purpose of adjusting the P.A.Y.E. code number. It is quite possible that it was related to the £18 6s. shown in the inaccurate return of April, 1952: but, even so, P.A.Y.E. is no more than provisional retention of tax. It is not assessment.

It appears, therefore, that in this case there was never any failure to charge the taxpayer with the true amount of his tax for the year or any inadequate lower assessment induced by his wrong return. There never was any sum, therefore, that could be computed by comparing the tax charged by such a first assessment with the total tax liability when ascertained, nor was there any figure attributable to an additional assessment. As I see no reason to suppose that what happened here represents an unlikely sequence of events, I am afraid that I regard the successive failures of Diplock J. and the Court of Appeal to find a maintainable interpretation of "treble the tax which he ought to be "charged under this Act" that escapes the onus of trebling the whole tax bill for the year as a very strong indication that there are really no means of escape open. I do not wish, however, to accept this conclusion without giving some attention to another possible interpretation which is indicated by that phrase of the Court of Appeal, "the tax appropriate to the undisclosed "income." Can one fairly regard the words of the section as enacting in some disguised way that the basis of computation is to be the difference between what would be the tax on the figures actually shown by a man in his return, whether or not there has been any assessment, and the tax on what he ought to have shown if he had made a full and correct return? This is a device applied by section 49 to certain cases, but it is noticeable that it there applies only to Schedule D income.

I find it impossible to penetrate this disguise. With all respect to those who may think otherwise, the contents of even a completely full and correct return are no measure of the proper assessment of a man's income for the year in which he makes it. The assessing authority is not under so much as a presumptive duty to make an assessment according to the return: how could it be when, except for Schedule D, the basis of assessment is the current year, which is not dealt with by the return, not the past year, which is? Assessments can be made, even where there is no return. They can be made, whatever a return shows. The contents of a return can be queried and further, more reliable, information extracted. They can be cross-checked and the results amended in consequence of extraneous information available to the surveyor. In other words, the relationship of the figures of the return to the proper assessment of the year is so tenuous that

I do not find it possible to suppose that the " tax which he ought " to be charged under this Act " can ever have been intended to mean the amount of tax which a person would escape if his inaccurate return were accepted as providing final figures for the purposes of assessment. The basic facts of the administration and collection of tax do not admit any reality to such a conception.

I come back, therefore, to the only construction which is, I believe, open to a court of law. When a man does what Mr. Hinchy did, sends in what is not a true and correct return, he commits an offence and the measure of his penalty must be ascertained as the situation is at that date. At that date he will neither have been assessed nor will he have paid any tax for the year except, it may be, some provisional deduction under P.A.Y.E. The question, what tax he ought to be charged under the Act seems to me to be, in these terms, a simple one. It is the sum of tax for which he will become liable for that year when assessment properly carried out under the Act has imposed liability upon him. It could not be anything else when the offence consists of failing or refusing to make a return at all, and I do not see how the meaning of the words can change if the offence takes the form of not making a full return.

I appreciate that the view to which the Court of Appeal felt entitled to come was largely encouraged by certain general considerations as to the result of accepting the Revenue's contention in cases of this kind. Personally, I do not find any of these considerations compulsive, in the sense that they can alter the meaning of the words that Parliament has used: but, as I am as well not altogether in agreement with the cogency of some of the things that have been said, I ought perhaps to make a brief allusion to them.

The first point made related to the way the Revenue's claim was computed, which was said to be inconsistent with its own construction of the section. It was said, for instance, that if the measure was the full tax payable by direct assessment in the year, tax levied by deduction being omitted, it was anomalous to include Schedule E tax collected under P.A.Y.E. This is not, I think, a valid criticism. Schedule E income remains liable to direct assessment at the instance either of the Revenue or of the taxpayer, though assessment can be dispensed with, and the P.A.Y.E. deductions are only provisional payments of tax in advance. In this respect income subject to P.A.Y.E. is quite different from, for instance, dividend income which is not directly assessable to income tax. Secondly, it was said that the treble tax claimed on the savings bank interest had in fact been computed only on the undisclosed portion instead of on the whole. This criticism arises from a misunderstanding of the two assessments and the way they worked out, and I have already explained what the actual circumstances were. Lastly, the comment was made that, to be consistent, surtax ought to be included in the basic computation as well as income tax. Mr. Hinchy was not a surtax payer, so the point does not arise here. All that need be said is that, if it does have to be decided at any time, there are arguments for treating the assessment and collection of surtax as carrying their own history and their own penalties, and section 25 (3) as not including surtax in the " tax " to be computed. In any event the point has no bearing on what we have now to determine.

Secondly, it is, of course, very true that the penalty provision, as interpreted by the Revenue, may not only impose fines which for some taxpayers would require payment of tens of thousands of pounds but also presents striking anomalies when its effect is contrasted with the effect of other penalty sections in the same Act. I do not think it necessary to dwell upon these or to illustrate them, because the opportunities of doing so are almost inexhaustible. What I do not perceive, however, is how these considerations can alter the interpretation of the words used by the statute. If it is said that Parliament could not have intended to impose such onerous fines for breaches which in some cases may not be blameworthy in any degree, I can only point out that Parliament has imposed just the same penalty where the default is neglect to make any return at all, and yet none of the suggested interpretations of the section achieves any penalty short of treble the whole direct assessment in those cases where there has been neither return nor assessment. Personally, I do not see any marked distinction in degrees of blame between mere carelessness which results in not making a return and that form of carelessness which leads to a return being made which misleadingly appears to be complete when it is not.

Again, whatever we managed to say about the meaning of the words in this case, there is no doubt that section 18 of the Act would still impose a penalty of treble the whole tax when a person without just excuse fails to give a notice of his liability to tax; that paragraph 4 of the Sixth Schedule would impose what may be the still more onerous burden of treble the tax on all income from all sources, if there is fraud in claiming a relief; and that section 48, section 49 and section 441 would contain provisions which in certain cases involve a charge of three times the full tax.

When it is said, therefore, that we ought to search for a more rational meaning of the words of section 25 (3) than that which is offered by the interpretation supported by the Revenue, I think that much depends upon what you regard as rational in this setting. Most of these penalty clauses have their origin in the Tax Acts of 1803–06, if not in the earlier Act of 1799. Income tax administration in those years was not the huge and efficient system to which we are now accustomed. If the purpose of Parliament at that time was, as I suspect, to impose heavy penalties for any kind of evasion, primarily as a deterrent, there is no reason for surprise that the various penalties are neither adjusted harmoniously to each other nor in themselves proportionate to degrees of blame or threatened losses of revenue. It was as "rational" to hit out blindly and heavily at anyone who was caught as to maintain savage and indiscriminate punishments under the criminal code until an effective police force had been established. What is more surprising is that, apart from the small changes made in the Finance Act, 1923, nothing has been done by Parliament ever since to review the whole unsatisfactory set of penalty sections and remodel them in the light of conceptions appropriate to the present day. Such a review has been called for both in the Report of the Income Tax Codification Committee (see Cmd. 5131, paras. 173–183) and in the Final Report of the most recent Royal Commission on Income Tax (see Cmd. 9474, Part VII, cap. 33), and the recommendation has no doubt reached the destination usually reserved for advice invited by governments from such committees.

LORD COHEN. My Lords, I had commenced writing a full judgment in this case, but, before I had completed it, I had the privilege of reading the opinion which has just been expressed by my noble and learned friend, Lord Radcliffe. I agree so entirely with his conclusions and with the reasons he gives for thinking this appeal must be allowed that I shall only detain your Lordships long enough to say that I prefer not to express any opinion as to whether surtax enters into the calculation of treble tax until that point arises. I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, the judgment of the Court of Appeal would seem to have proceeded on a false premise, namely, that after the false return was made by the respondent he was assessed on the return so made and that there was a balance of income undisclosed on which he had not been assessed. But that was not the position. The discovery by the Revenue of the undisclosed income was made after the return had been made and before any assessment was made. Mr. Hinchy was then assessed, after deduction of due allowances, on the full amount of income subject to assessment, including the Post Office Savings Bank interest which he had failed to disclose. Thereafter proceedings were taken for recovery of penalty in respect of the incorrect return. The Court of Appeal, in my opinion correctly, say that the offence is committed when the false return is received by the commissioners. The liability to penalty necessarily arises at the time of the offence. It is a case of a false return with which we are here concerned, and it will be convenient to set out the relevant and material dates. [His Lordship stated the facts and continued:]

On one view of the Court of Appeal's judgment it might appear that, if the true facts and sequence of events had been appreciated, they might have decided this case in favour of the Revenue. I quote only one passage from the judgment where they say [15]: "There remains the judge's interpretation of the "relevant words (the third view above indicated), namely, that "'the tax which he ought to be charged' means what we have "called the excess tax—that is, the tax which the taxpayer ought "to be charged and was not charged because of his failure to "make a true and correct statement of his income. Where there "has been failure to make any return at all, the 'tax which he "'ought to be charged' will, of course, be the total of his tax "liability for the relevant period. But where, as in the present "case, the taxpayer's default lay in an understatement of one "of his sources of income, then the tax which he ought to be "charged will, on this interpretation, mean the tax which he "ought to be charged (but was not charged by reason of his "default) on the undisclosed income." It would seem clear from this passage that the court did not, as I have said, appreciate the true facts of the case. If the court had dealt with the true situation, I am not clear what result they would have reached. There is much in the train of thought in the judgment which suggests that they might still have held that the proper penalty was only £20 and treble tax on the amount which the taxpayer failed to disclose on his return. As the respondent was not represented on the appeal, and no case was lodged on his behalf, it is only right that any point that can be advanced on his behalf should be considered. It is partly, I understand, because of the difficulties and uncertainty which the Revenue conceive this judgment has created for them in their enforcement of the penalty provisions of the Act that they have brought this appeal.

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[15] [1959] 2 Q.B. 357, 377.

The claim here is made under section 25 (3) of the Income Tax Act, 1952. The point in issue is a short one, namely, what is meant by the words in subsection (3), " treble the tax which " he ought to be charged under this Act." There are a number of penalty sections under the Act, all of which were referred to in the course of the argument. They do not provide any coherent or intelligent code, and in the confines sometimes of even a single section apparent anomalies can be discovered. It will be convenient to consider these sections in three groups according to the variation of language by which the penalty is imposed.

In the first group I place section 18 and section 25, omitting for the time being the sections to which section 25 applies; in the second group section 48 and section 49; and in the third group paragraph 4 of Schedule VI.

Section 18 and section 25 read as follows:

" 18.—(1) It shall be the duty of every person who is chargeable to income tax for any year of assessment to give notice to " the surveyor that he is so chargeable at or before the end of " that year: Provided that no such notice need be given by any " person as respects any year for which he has delivered a statement of his profits and gains in accordance with the provisions " of this Act. (2) If any person, without reasonable excuse, fails " to give such a notice as aforesaid, he shall—(*a*) if proceeded " against by action in any court, forfeit the sum of twenty pounds " and treble the tax which he ought to be charged under this " Act; or (*b*) if proceeded against before the General Commissioners, forfeit a sum not exceeding twenty pounds and treble " the tax which he ought to be charged under this Act, and where " he is proceeded against before the General Commissioners, the " penalty shall be recovered in the same manner as any other " penalty under this Act, and the increased tax shall be added " to the assessment."

" 25.—(1) Any such lists, declarations, statements and returns " as are provided for by the preceding provisions of this Chapter " shall be in such form as the Commissioners of Inland Revenue " shall prescribe, and in prescribing forms under this subsection " the Commissioners shall have regard to the desirability of "securing, so far as may be possible, that no person shall be "required to make more than one return annually of the sources "of his income and the amounts derived therefrom. (2) Any "statement of annual value or profits or gains to be charged "under Schedule A, Schedule B, Schedule D or Schedule E "shall include a general declaration declaring the truth thereof "and that the same is fully stated on every description of property, or profits or gains, included in the Act relating to the "tax, and appertaining to the person returning the statement, "estimated to the best of his judgment and belief, according to "the provisions of this Act. (3) A person who neglects or refuses "to deliver, within the time limited in any notice served on him, "or wilfully makes delay in delivering, a true and correct list, "declaration, statement or return which he is required under "the preceding provisions of this Chapter to deliver shall—(*a*) if "proceeded against by action in any court, forfeit the sum of "twenty pounds and treble the tax which he ought to be charged "under this Act; or (*b*) if proceeded against before the General "Commissioners, forfeit a sum not exceeding twenty pounds and "treble the tax which he ought to be charged under this Act, "and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as "any other penalty under this Act, and the increased tax shall "be added to the assessment. (4) The commissioners shall also "proceed to assess or cause to be assessed every such person "who makes default as aforesaid. (5) If any person who is "required to deliver a list, declaration, statement or return on "behalf of any other person delivers an imperfect list, declaration, statement or return and declares himself unable, within "the time limited, to deliver a more perfect list, declaration, "statement or return and states the reasons for his inability, he "shall not, if the General Commissioners are satisfied with his "explanation and grant further time for delivery, be liable to "the penalty prescribed by this section if he delivers, within the "further time granted, as perfect a list, declaration, statement "or return as the nature of the case permits. (6) If a person "delivers to any surveyor a list, declaration or statement on a "form prepared for the purpose by direction of the Commissioners "of Inland Revenue, he shall be deemed for the purposes of this "section to have been required by a notice under the preceding "provisions of this Chapter to prepare and deliver that list, "declaration or statement, and the time limited for the delivery "thereof shall be deemed for the purposes of this section to have "expired on the date of its delivery to the said surveyor. (7) Any "list, declaration, statement or return required by the preceding "provisions of this Chapter to be delivered to the surveyor shall "be made available to the General, Additional or Special Commissioners and their respective clerks, and, whenever necessary, "to the assessors for the preparation and making of assessments."

The provisions of subsection (2) of section 18 and subsection (3) of section 25 are in identical terms, apart from the introductory words indicating the nature of the offence struck at by the penalty provision. Section 18 deals with concealment of chargeability to tax for any year of assessment, a reference back to section 1 of the Act. The offence presumably will be committed if the potential taxpayer allows the year of assessment to run out without disclosing his chargeability. Section 25 relates to persons who are known to the surveyor of taxes and are required to make one or other of the returns in sections 19 to 23 of the Act, including persons required (section 19) to deliver true and correct returns of all sources of their income. I can see no ground for placing any different construction on the words "treble the tax which "he ought to be charged under this Act" in subsection (3) of section 25 from the meaning they have in section 18; or for saying that they have one meaning where the taxpayer neglects or refuses to deliver any return within the stipulated time as required by the Act, and a different meaning when he wilfully makes delay in delivering a true and correct return of his income as similarly required. The decision of this House in *Attorney-General* v. *Till* [16] is binding authority that delivery of an incorrect return is breach of this requirement. The question of the construction of these words may to some extent be resolved, I think, by asking how is it to be ascertained what tax the defaulter ought to be charged under the Act. The only way, in my opinion, is through the machinery of assessment set up by the Act. The court cannot take upon itself this task. It was so held, I think rightly, in an unreported Irish case—*Attorney-General* v. *White* [17]—under corresponding income tax provisions in Ireland, judgments in which were made available to your Lordships. Can it be said that the words have an ambulatory meaning, so that, if the taxpayer makes an incorrect return, the tax which he ought to be charged under the Act is limited to tax on the amount of the undisclosed income? This is the view, I think, taken by the Court of Appeal. I find it impossible to put such a construction on words which seem to me to be quite unambiguous. So limited the tax would be only part of the tax which he ought to be charged under the Act. It was conceded by the learned Attorney-General that the penalty is to be measured only by tax on income which is the subject of direct assessment, a concession which I am disposed to think could not be withheld. Income from which tax is deducted under Schedule D is not income charged to tax in the hands of the recipient. Nor is it contended for the Revenue that the tax to be charged includes surtax, for reasons which I do not find it necessary to examine. It may be noted also in passing that the non-fraudulent offender has a method of escape from the stringency of the penalties, under section 55 of the Act, which gives opportunity for rectification of returns and other relief.

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[16] [1910] A.C. 50.

[17] (1931) March 3, unrep.

Sections 48 and 49 of the Act are as follows:

"48.—(1) Where a person who ought to be charged with
" tax, as directed by this Act, is not duly assessed and charged
" by reason that he has—(*a*) fraudulently changed his place of
" residence or fraudulently converted, or fraudulently released,
" assigned or conveyed any of his property; or (*b*) made and
" delivered any statement or schedule which is false or fraudu-
" lent; or (*c*) fraudulently converted any of his property, which
" was chargeable, by altering any security relating thereto or by
" fraudulently rendering it temporarily unproductive, in order not
" to be charged for the same or any part thereof; or (*d*) been guilty
" of any falsehood, wilful neglect, fraud, covin, art or contrivance
" whatsoever, such person shall, on proof thereof to the General
" Commissioners for the division in which he has been charged,
" or, if he has not been charged, then for any division in which
" he is chargeable, be assessed and charged treble the amount of
" the charge which ought to have been made upon him: Provided
" that, if any charge has been made, but that charge is less than
" the charge which ought to have been made, such person shall
" be assessed and charged, over and above the former charge,
" treble the amount of the difference between the charge which
" was made and the charge which ought to have been made, such
" amount to be added to the assessment. (2) A person who
" knowingly and wilfully aids, abets, assists, incites or induces
" another person to make or deliver a false or fraudulent account,
" statement, or declaration, of or concerning any profits or gains
" chargeable, or the yearly rent or value of any lands, tenements,
" hereditaments or heritages, or any matters affecting any such

"rent or value, shall for every such offence forfeit the sum of "five hundred pounds.

"49.—(1) If the Additional Commissioners or the General "Commissioners—(*a*) have made a charge to tax under Schedule "D in respect of a sum in excess of the amount contained in "either the statement or the schedule of a person to be charged; "or (*b*) discover, from the information of the surveyor, or other"wise, that a charge to tax in respect of a sum in excess of either "such amount ought to be made, and an assessment is made, "at any time within the year of assessment or within three years "after the expiration thereof, they may, unless the person to be "charged proves to their satisfaction that the omission by him "did not proceed from any fraud, covin, art or contrivance or "any gross or wilful neglect, charge that person, in respect of "such excess, in a sum not exceeding treble the amount of the "tax on the amount of the excess. (2) If the person to be "charged has neglected or refused to deliver a statement or "schedule, the said commissioners may charge him in a sum not "exceeding treble the amount of the tax with which, in their "judgment, he ought to be charged, and such sum shall be added "to the assessment and applied in the same manner as other "increased charges are applied."

The proviso to subsection (1) of section 48 clearly limits the penalty to treble the tax on the amount of income undisclosed where a charge has already been made on the disclosed amount. There may be observed, however, several new features in the matter of penalty. There is no £20 penalty. There is no provision for proceedings for penalty in a court. The penalty is a fixed penalty of treble tax, not a maximum within which the commissioners have a discretion to operate. Lastly, if the fraud is discovered before any tax is imposed the penalty is treble tax. Only where tax has already been charged does the taxpayer escape with treble tax measured by what he has fraudulently concealed. It may be doubted whether this section shows any leniency to the fraudulent taxpayer as contrasted with the treatment accorded to a neglectful taxpayer under section 25. The restricted penalty imposed by the proviso, limited though it be by the amount fraudulently undisclosed, may be a very heavy penalty, as compared with a discretionary penalty that the commissioners are entitled to impose under section 25. Only in contrast with the penalty imposed by a court under section 25 can it be said that the fraudulent taxpayer who comes under the proviso may escape relatively lightly. That is undoubtedly an anomaly. But it would seem to be no greater an anomaly than that accorded to two fraudulent taxpayers under section 48 itself, according as an assessment has already been made on one and not on the other, a difference in treatment which I confess I find it difficult to understand. Whatever anomalies exist between section 25 and section 48 these provide no ground for reading into section 25 (3) (*a*) the proviso of section 48 (1), as the Court of Appeal in effect would seek to do, with the result incidentally of repeating in the case of neglectful taxpayers the anomaly already observed to exist as between fraudulent taxpayers. The reference in the section to " the charge which ought to have been made " as contrasted with the words " the tax which he ought to be charged " in section 25 (3) raises another question which seems to me to lead nowhere. It would, I think, make no real difference if the words of section 25 were substituted for the words in section 48 so far as the meaning of section 48 was concerned.

Section 49 provides another variation of a penalty clause. It applies only to charges to tax under Schedule D. The words " not " exceeding " reappear in this section. The penalty in the circumstances to which the provisions of the section apply is a sum not exceeding treble tax on the amount the taxpayer has omitted to return. Again there is no question of a £20 penalty.

Lastly, I come to paragraph 4 of Schedule VI. It runs as follows: " (1) A person who, in making a claim for or obtaining " any relief to which this Schedule relates, or in obtaining any " certificate as aforesaid—(*a*) is guilty of any fraud or contrivance; " or (*b*) fraudulently conceals or untruly declares any income or " any sum which he has charged against or deducted from, or was " entitled to charge against or to deduct from, another person; or " (*c*) fraudulently makes a second claim for the same cause, shall " forfeit the sum of twenty pounds and treble the tax chargeable " in respect of all the sources of his income as if such claim had " not been allowed. (2) A person who knowingly and wilfully aids " or abets any person in committing an offence under this paragraph shall forfeit the sum of £500."

Here your Lordships find a further variation of penalty in cases of fraudulent claims for relief, reflecting often relatively small results in the matter of tax liability. The penalty here is the severest of all. The £20 penalty makes its appearance again; treble tax is mandatory; and it is imposed " in respect of all the " sources of his income as if such claim had not been allowed." It is thus not limited as in sections 18, 25 and 48 to income subject to direct assessment.

I have referred to these sections because they all disclose in the circumstances to which they apply a variety of penalties which present no intelligible pattern and which, in relation to one another, seem often highly inequitable. Nor does the general power of mitigation vested in the Commissioners of Inland Revenue and the Treasury by section 500, in my opinion, really affect this result. The survey of these sections has, I think, this relevance to the subject-matter of this appeal. It shows that it is impossible to argue from one penalty section to another or to infer because of illogicalities between different sections, or inequitable results that may follow from a particular construction, that therefore the legislature cannot have meant what the words of section 25 (3) plainly say. I would add that these sections have an ancient lineage dating back more than 150 years and show very little essential change in that period. Section 25 (3) shows a greater number of changes evolved during that period, but in spite of opportunities thus afforded Parliament has not thought fit to make any substantial change, apart from quantum of penalty, in the form of language by which the penalty was imposed from at least 1805.

In conclusion, I would say a word about the effect of section 25 on certain sections of the Act to which it applies. These are notably sections 21 to 23 and 27 to 29 inclusive. The results in the view of the Court of Appeal were so startling as to play a large part in their reaching a construction of section 25 (3) that would enable them to escape the rigour of a literal construction of its words. For the reasons I have given I think, on any view of its effect on the sections in question, that escape would be impossible. But it is a question whether any talk of escape is necessary. In any case in which it was necessary to consider the matter I would wish to hear argument on two points. First, whether the impact of section 25 on sections like 21 and 22 affects tax on the income of any person other than the constituent in respect of whose income a return is made by a person in a representative or quasi-representative capacity. Secondly, whether when a return is made under such sections as 23, 27 or 29, which are not concerned with returns of income but with lists of names of persons who may be chargeable to tax in respect, inter alia, of payments made by the person responsible for the return, there is any basis for a penalty under section 25 other than that of the fixed penalty of £20. In other words, whether there is any income covered by the subject-matter of the return in respect of which it can be said that the person making the return "ought to be charged to tax under this Act." These are incidental matters which cropped up in the course of the argument before this House and which, on the view taken by the Court of Appeal of resulting personal chargeability, seem to have weighed heavily with the court. I say no more about these two questions which on any view can, in my opinion, have no effect on this case.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitor: *Solicitor of Inland Revenue.*

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ABDUL RAHMAN AL BAKER . . . . APPELLANT;

AND

ROBERT EDMUND ALFORD AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ST. HELENA.

Foreign Jurisdiction—Decision of Secretary of State conclusive—Crown's jurisdiction to extend Colonial Prisoners Removal Act, 1869, *to Bahrain—Prisoner "under sentence"—Colonial Prisoners Removal Act,* 1869 (32 *&* 33 *Vict. c.* 10), *ss.* 4, 5*—Foreign Jurisdiction Act,* 1890 (53 *&* 54 *Vict. c.* 37), *ss.* 4, 5*—Sched. I (as amended by the Foreign Jurisdiction Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 16))*—Bahrain Order,* 1952, *arts.* 8, 67, 68*—Bahrain (Removal of Prisoners) Order,* 1956 (*S.I.* 1956, *No.* 2031)*—Prisoners Removal (Bahrain and St. Helena) Order,* 1956 (*S.I.* 1956, *No.* 2032).

By section 4 of the Colonial Prisoners Removal Act, 1869: "Any two colonies may, with the sanction of an order of Her "Majesty in Council, agree to the removal of any prisoners under "sentence . . . from one of such colonies to the other for the purpose "of their undergoing in such other colony the whole or part of their "punishment . . . The agreement of any one colony with another "shall . . . be testified by a writing under the hand of the governor "of such colony." Section 5 provides: "Where the sanction of "Her Majesty has been given to any such agreement . . . any "prisoners under sentence . . . may be removed from such one colony "to the other under the authority of a warrant signed by the "governor, and addressed to the master of any ship . . ."

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* *Present*: Lord Radcliffe, Lord Tucker, Lord Keith of Avonholm, Lord Jenkins, Lord Morris of Borth-y-Gest.

By the Foreign Jurisdiction Act, 1890, s. 4: "(1) If in any "proceeding, civil or criminal, in a court . . . held under the "authority of Her Majesty any question arises as to the existence "or extent of any jurisdiction of Her Majesty in a foreign country, "a Secretary of State shall, on the application of the court, send "to the court . . . his decision on the question, and his decision shall "for the purposes of the proceeding be final. (2) . . . those answers "[by the Secretary of State] shall, on production thereof, be "conclusive evidence of the matters therein contained."

The appellant, who was a subject of the Ruler of Bahrain or of the Ruler of Qatar, and resident in the State of Bahrain, following disturbances in Bahrain in November, 1956, was, with others, tried in and convicted by a special court set up by the Ruler of Bahrain on a charge of, inter alia, the attempted assassination of the Ruler and some of his family and his British adviser, and he was sentenced to 14 years' imprisonment (later reduced to 13 years). Bahrain was a foreign country in which Her Majesty had certain jurisdiction, and following addresses to Her Majesty by the Governor of St. Helena and the Ruler of Bahrain requesting permission to make arrangements for the removal of the accused persons, if convicted, to St. Helena to serve their sentences there, two Orders in Council were made, the first of which (the Extension Order), in purported exercise of the powers conferred by section 5 of the Foreign Jurisdiction Acts, 1890 and 1913, extended the Colonial Prisoners Removal Act, 1869, to Bahrain, and by the second (the Sanction Order) the Governor of St. Helena and the Ruler of Bahrain were authorised to enter into an agreement for the removal of the prisoners from Bahrain to St. Helena. Thereafter a purported agreement to that effect was entered into and thereupon, pursuant to a warrant issued by the Ruler of Bahrain—which was dated two days before the Sanction Order was published in Bahrain—the prisoners were delivered into the custody of the captain of a British warship and taken to St. Helena.

The appellant applied for a writ of habeas corpus ad subjiciendum, contending, inter alia, that Her Majesty's jurisdiction in Bahrain did not include power to extend the Colonial Prisoners Removal Act, 1869, to subjects of Bahrain or Qatar, and that, even if it did, the appellant was not a prisoner "under sentence" within the meaning of section 4 of the Act of 1869 which, it was contended, applied only to prisoners convicted by British courts and not by the special court set up by the Ruler.

Questions as to the existence and extent of Her Majesty's jurisdiction in Bahrain over persons being subjects of the Ruler of Bahrain or Qatar having been addressed by the Board to the Secretary of State for decision under section 4 of the Foreign Jurisdiction Act, 1890, the latter replied to the effect that on the relevant date, December 19, 1956 (when the Extension and Sanction Orders were made), Her Majesty did have legislative jurisdiction in Bahrain to extend the Act of 1869 to Bahrain, and to exercise the powers conferred on her by that Act in relation, inter alia, to subjects of the Ruler of Bahrain or Qatar:—

Held, (1) that having regard to the language of section 4 of the Act of 1890 the answers of the Secretary of State finally decided the questions of jurisdiction against the appellant, and the Act of 1869 was accordingly validly extended to subjects of Bahrain and Qatar by the Extension Order and validly put into operation by the Sanction Order (post, p. 805).

(2) The appellant was a prisoner "under sentence" within the meaning of section 4 of the Act of 1869. The effect of the extension of that Act to a foreign country by the Act of 1890 (as amended) was to put the foreign country from which prisoners under sentence might be removable in the same position as a British colony from which such prisoners might be removable under the Act of 1869, and to make removable from the foreign country concerned prisoners sentenced under the local law, and by the courts, of that country just as the Act of 1869 made removable from a British colony prisoners sentenced under the local law, and by the courts, of that colony (post, p. 806).

Further, whether or not the case was a "mixed case" within the meaning of Part VIII of the Bahrain Order, 1952 (by which Her Majesty, in exercise of the powers conferred by the Foreign Jurisdiction Acts, 1890 and 1913, made provision for the exercise of her jurisdiction in Bahrain) the Ruler had jurisdiction to try the appellant in the special court, if a mixed case by virtue of article 67 (2) of the Order of 1952, and a notification thereunder by the Political Resident to the effect that "a person not subject "to the Order"—and the appellant was not so subject—"may be "tried by the court within whose jurisdiction the accused is"; or, if not a mixed case, by virtue of the residual jurisdiction of the Ruler in cases not covered by the Order of 1952 (post, p. 808).

(3) Inasmuch as Her Majesty's jurisdiction to make the Extension and Sanction Orders did not depend on the existence at the time of making them of any particular prisoners under sentence, the fact that the addresses were presented to Her Majesty for the purpose of obtaining the Sanction Order, and that the Orders were made before the date of the conviction of the appellant was immaterial (post, p. 809).

(4) While the documents relied on by the respondents as constituting an agreement between the Governor of St. Helena and the Ruler of Bahrain, made pursuant to the sanction given by the Sanction Order, were in general terms and did not condescend to matters of administrative detail, there was a sufficient compliance with section 4 of the Act of 1869 and the Sanction Order, and there was no ground for impeaching the validity or sufficiency of the agreement (post, p. 811).

(5) Although the warrant under which the appellant was delivered into the custody of the captain of the warship was dated two days before the Sanction Order was published in, and came into force in, Bahrain, the warrant was not a nullity, the relevant date being that when it was put into operation—which was the date of

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the Sanction Order—and not the date on which it was penned or otherwise brought into existence in a physical sense (post, p. 811).

Judgment of the Supreme Court of St. Helena affirmed.

APPEAL (No. 43 of 1959), by special leave, from a judgment of the Supreme Court of St. Helena.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: In this case the appellant, Abdul Rahman Al Baker, appealed to Her Majesty in Council from a judgment of the Supreme Court of St. Helena dated March 20, 1959, whereby Brett J., sitting as acting Chief Justice, dismissed his application for the issue of a writ of habeas corpus ad subjiciendum directed to the first respondent, Mr. Robert Edmund Alford as Governor of, and to the second respondent, Patrick Vincent Truebody as Superintendent of Gaols in, St. Helena, to have the body of the appellant before a judge in chambers.

It was not in dispute that the appellant was now and had since January 27, 1957, been a prisoner in St. Helena, and that he was at the present time held in the custody of the second respondent upon the authority, or purported authority, of a warrant issued by the first respondent who had held the office of Governor and Commander-in-Chief of the colony since 1958. The question in the appeal was whether in the circumstances hereinafter stated the appellant was lawfully so imprisoned.

The appellant was a subject of the Ruler of Bahrain or of the Ruler of Qatar—for the purposes of the present case it mattered not which—and he was at all material times prior to his removal to St. Helena as hereinafter mentioned resident in the State of Bahrain.

During the first three days of November, 1956, serious disturbances occurred in Bahrain, in the course of which rioting and widespread damage to property occurred. Those disturbances resulted in the arrest of the appellant and four other men, all five of whom were brought before a special court set up by the Ruler of Bahrain (hereinafter called "the Ruler") on December 22, 1956, and charged (inter alia) with attempting to carry out: (a) The assassination of the Ruler and some of his family, the assassination of his Adviser Sir Charles Belgrave, the destruction of the palace of the Ruler, and the setting fire to the airport of al Moharraq and other places; (b) the overthrow by illegal means of governmental control; and (c) the removal of the Ruler from authority over his principality by deposing him.

On December 23, 1956, all five men, including the appellant, were convicted by the special court and sentenced in the cases of the appellant and two others to 14 years', and in the two remaining cases to 10 years' imprisonment. The appellant's sentence was later reduced by the Ruler to 13 years.

Between the arrest of the five men concerned and their conviction and sentence the Ruler appeared to have manifested some anxiety (no doubt for reasons of security) lest if convicted and sentenced they should serve their sentences in Bahrain; for on or about December 1, 1956, the Adviser orally informed Sir Bernard Burrows, Her Majesty's Political Resident in the Persian Gulf, of the impending trial, and asked whether in the event of the men concerned being convicted and sentenced to terms of imprisonment Her Majesty's Government would be willing to arrange for them to undergo their sentences in a British possession.

On December 18, 1956, the Political Resident orally informed the Adviser that Her Majesty's Government were willing to arrange for the removal of the men to a British possession to undergo any sentences that might be passed upon them, and that the Government of St. Helena had signified its willingness to receive them; but that Orders in Council would need to be made.

By sections 4 and 5 of the Colonial Prisoners Removal Act, 1869 (which by section 2 defines the term Colony as including, with exceptions and qualifications not here material, any plantation, territory or settlement situate within Her Majesty's dominions), it was provided as follows:

> "4. Any two colonies, may, with the sanction of an order of "Her Majesty in Council, agree for the removal of any prisoners "under sentence or order of transportation, imprisonment, or "penal servitude from one of such colonies to the other for the "purpose of their undergoing in such other colony the whole or "any part of their punishment, and for the return of such "prisoners to the former colony at the expiration of their punishment, or at such other period as may be agreed upon, upon such "terms and subject to such conditions as may seem good to the "said colonies.
>
> "The sanction of the order of Her Majesty in Council may be "obtained, in the case of a colony having a legislative body, on "an address of such body to Her Majesty, and in the case of any "colony not having a legislative body, on an address of the "governor of such colony; and such sanction shall be in force as "soon as such order in council has been published in the colony "to which it relates.
>
> "The agreement of any one colony with another shall for the

"purposes of this Act be testified by a writing under the hand "of the governor of such colony.

"5. Where the sanction of Her Majesty has been given to any "such agreement as aforesaid relating to the removal of prisoners "from one colony to another for the purpose of undergoing their "punishment, any prisoners under sentence or order of transportation, imprisonment, or penal servitude may be removed from "such one colony to the other under the authority of a warrant "signed by the governor, and addressed to the master of any ship, "or any other person or persons; and the person or persons to "whom such warrant is addressed shall have power to convey "the prisoner herein named to such other colony, and to deliver "him when there into the custody of any authority designated in "such warrant, or empowered by the governor of such last-"mentioned colony to receive such prisoner."

The Foreign Jurisdiction Act, 1890, included the following provisions:

"1. It is and shall be lawful for Her Majesty the Queen to "hold, exercise, and enjoy any jurisdiction which Her Majesty "now has or may at any time hereafter have within a foreign "country in the same and as ample a manner as if Her Majesty "had acquired that jurisdiction by the cession or conquest of "territory. . . .

"3. Every act and thing done in pursuance of any jurisdiction "of Her Majesty in a foreign country shall be as valid as if it had "been done according to the local law then in force in that "country.

"4.—(1) If in any proceeding, civil or criminal, in a court in Her "Majesty's dominions or held under the authority of Her Majesty "any question arises as to the existence or extent of any jurisdic-"tion of Her Majesty in a foreign country, a Secretary of State "shall, on the application of the court, sent to the court within a "reasonable time his decision on the question, and his decision "shall for the purposes of the proceeding be final.

"(2) The court shall send to the Secretary of State, in a docu-"ment under the seal of the court, or signed by a judge of the "court, questions framed so as properly to raise the question, and "sufficient answers to those questions shall be returned by the "Secretary of State to the court, and those answers shall, on "production thereof, be conclusive evidence of the matter therein "contained.

"5.—(1) It shall be lawful for Her Majesty the Queen in

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"Council, if She thinks fit, by Order to direct that all or any of "the enactments described in the First Schedule to this Act, or "any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the Order mentioned, to "any foreign country in which for the time being Her Majesty "has jurisdiction.

"(2) Thereupon those enactments shall, to the extent of that "jurisdiction, operate as if that country were a British possession, "and as if Her Majesty in Council were the legislature of that "possession. . . .

"16. In this Act,— . . . The expression 'foreign country' "means any country or place out of Her Majesty's dominions: . . . "The expression 'jurisdiction' includes power."

The Colonial Prisoners Removal Act, 1869, was not one of the enactments described in the First Schedule to the Foreign Jurisdiction Act, 1890, but was added to that Schedule by the Foreign Jurisdiction Act, 1913.

Accordingly, at the time when the disposal of the appellant and his four co-defendants in the event of their being convicted and sentenced to imprisonment was under discussion the position was that, under section 5 of the Act of 1890 and the First Schedule to that Act as amended by the Act of 1913, Her Majesty had power by Order in Council to direct that the Act of 1869 should extend, with or without any exceptions, adaptations, or modifications in the Order mentioned to any foreign country in which for the time being Her Majesty had jurisdiction; and that upon such order being made the Act of 1869 would, to the extent of that jurisdiction, operate as if that country was a British possession and as if Her Majesty in Council were the legislature of that possession.

Bahrain was a foreign country in which "by treaty capitulation grant usage sufferance and other lawful means" (to quote the language of the Foreign Jurisdiction Act, 1890), Her Majesty had and had had at all times material to this appeal, certain jurisdiction.

By the Bahrain Order, 1952 (replacing the Bahrain Order, 1949), Her Majesty had "by virtue and in exercise of the powers "in this behalf by the Foreign Jurisdiction Acts 1890 and 1913 "or otherwise in Her Majesty vested" made provision for the exercise of such jurisdiction to the extent therein appearing.

By article 2 of the Order of 1952 the limits of the Order were

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defined as "all the territories of the Ruler of Bahrain including "the territorial waters thereof, and all other areas over which he "has jurisdiction." By article 4 the expression "Persons subject "to this Order" was defined as meaning "those persons to whom "the powers conferred by this Order extend in accordance with "article 8 (1)"; and the expression "Persons not subject to "this Order" as meaning those persons referred to in article 8 (1) (*a*) or (*b*). By article 8, "The powers conferred by this Order "shall extend to the persons and matters following:

"(1) All persons, except the following: (*a*) individuals who are "Bahrain subjects and corporations which are incorporated under "a law enacted by the Ruler; (*b*) individuals who are subjects of "the Rulers of Saudi Arabia, the Yemen, Muscat and Oman, "Kuwait, Qatar or any of the Trucial States."

By paragraph (2) of article 8 the powers conferred by the Order were made to extend to the property and liabilities within the limits of the Order of all persons subject to the Order; and by paragraphs (3) and (4) such powers were extended to British ships and aircraft, and ships and aircraft belonging to persons subject to the Order, and all persons (whether subject or not to the Order) in respect of all acts committed by them on board such ships and aircraft, subject to the proviso that "where the persons committing such acts are persons not subject to this Order all cases "wherein they are concerned shall be dealt with in accordance "with Part VIII of this Order."

Article 14 of the Order provided as follows "14.—(1) For the "purposes of the exercise of jurisdiction under this Order there "shall be constituted and maintained: (i) Her Britannic Majesty's "Court for Bahrain . . . (ii) Her Britannic Majesty's Chief Court "for the Persian Gulf . . . (iii) Her Britannic Majesty's Full Court "for the Persian Gulf . . . (iv) The Joint Court and the Joint "Court of Appeal referred to in Part VIII of this Order. (2) . . . "(ii) Subject to the provisions of Part VIII of this Order, all Her "Majesty's jurisdiction in Bahrain, civil and criminal, not under "this Order vested exclusively in the Chief Court shall be vested "in the Court for Bahrain."

Part VIII of the Order, headed "*Mixed cases: Persons not* "*subject to this Order and Persons subject to this Order*" included the following provisions:

"67.—(1) For the purposes of the exercise of jurisdiction in "cases civil and criminal in which both persons not subject to this "Order and persons subject to this Order are parties, herein "described as Mixed Cases, or in which any person not subject "to this Order whom the Political Agent at his discretion registers "as being in the regular service of a person subject to this Order "is a party there shall be constituted a Joint Court.

"(2) However, with the concurrence of the Political Resident "and notwithstanding any other provision of this Part of the "Order, any mixed case or class of mixed case may be tried by "the courts within the general jurisdiction of which the accused "or defendant is.

"(3) The Joint Court shall be composed of either a judge or "the registrar of the Court for Bahrain and the Ruler or any "official appointed by him.

"(a) Criminal

"68.—(1) When a person not subject to this Order is alleged to "have committed an offence in relation to a person subject to this "Order, or a person subject to this Order is alleged to have "committed an offence in relation to a person not subject to this "Order, the Court for Bahrain shall entertain the same and send it "to the Joint Court unless the case falls within article 67 (2)."

It was to be observed that the appellant, being a subject of Bahrain or Qatar was under article 8 a person not subject to the Order of 1952.

To resume the narrative of events, on December 18, 1956, Sir James Harford, who held the office of Governor and Commander-in-Chief of St. Helena from 1953 to 1958, submitted to Her Majesty an address in the following terms:

"Whereas the Ruler of Bahrain has expressed his desire that "arrangements should be entered into between Bahrain and St. "Helena for removal of certain prisoners from Bahrain to "St. Helena.

"And Whereas it is proposed to make provision for the "extension of the Colonial Prisoners Removal Act, 1869, to "Bahrain:

"Now therefore I, the Governor of St. Helena, do hereby "respectfully submit to Her Majesty this my humble Address "praying that sanction be given by Order of Her Majesty in "Council in order that the desired arrangements may be entered "into between Bahrain and St. Helena in pursuance of the said "Act.

"Given under my hand at the Castle Jamestown this 18th day "of December, 1956.

"J. D. HARFORD."

Also on December 18, 1956, the Ruler submitted to Her Majesty an address in less formal terms, the text of which as translated for the purposes of the case read as follows:

"To Her Majesty the Queen of Britain. May God preserve "and keep her.

"In view of the ancient friendship long existing between Her "Majesty's Government and us we request assistance from time "to time in removing certain persons sentenced in our court to a "safe place outside Bahrain for imprisonment for the appointed "sentence. We beseech you to allow us to make arrangements "with the Governor of the island of St. Helena for the reception "of the persons who will be sent to that island in accordance with "the sentence decided. Always, Your Majesty, placing con"fidence in a response to our request. May God keep you in His "care."

"SALMAN."

On December 19, 1956, Her Majesty made two Orders in Council, viz.: (i) The Bahrain (Removal of Prisoners) Order, 1956 (S.I. 1956, No. 2031) (hereinafter called "the Extension Order") which (by article 1) came into force on December 19, 1956, and (by article 2) extended the Colonial Prisoners Removal Act, 1869, to Bahrain by virtue and in exercise of the powers in that behalf vested in Her Majesty by the Foreign Jurisdiction Acts, 1890 and 1913; and went on to provide (by article 3 (1)) that in the application of the Colonial Prisoners Removal Act, 1869, to persons subject to the Bahrain Order, 1952, references to the Governor should be construed as references to the Political Resident, and in its application to other persons such references should be construed as references to the Ruler of Bahrain: and (ii) The Prisoners Removal (Bahrain and St. Helena) Order, 1956 (S.I. 1956, No. 2032) (hereinafter called "the Sanction Order") whereby after a recital that the Ruler of Bahrain and the Governor of the Colony of St. Helena had presented addresses to Her Majesty requesting the sanction of Her Majesty as thereinafter provided, the sanction of Her Majesty was given in order that the Ruler and the Governor of St. Helena might in accordance with section 4 of the Colonial Prisoners Removal Act (as extended to Bahrain by the Extension Order) enter into an agreement for the removal of prisoners (not being persons subject to the Bahrain Order, 1952, as from time to time amended) from Bahrain to the colony of St. Helena and for their return.

As already mentioned, the appellant and the four other men

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concerned were on December 23, 1956, convicted and sentenced to imprisonment by the special court set up by the Ruler.

On December 24, 1956, the Governor sent to the Secretary of State for the Colonies a despatch under his hand which (omitting formal parts) was in these terms:

" Sir,

" With reference to your telegram No. 122 of 13th December, " I have the honour to inform you of my concurrence in the pro- " posed arrangements for detention in St. Helena of five Bahrain " subjects after removal from Bahrain under the terms of the " Colonial Prisoners Removal Act, 1869."

On December 26, 1956, the Ruler through the Adviser handed to the Political Resident (as representing Her Majesty) a document which, as translated from the Arabic for the purposes of this case, read as follows:

" *AGREEMENT*

" Whereas sentence of imprisonment for 14 years has been " passed on the following persons:

" Abdul Rahman Al Baker
" Abdul Aziz Al Shamlan
" Abdullah Al Aliwat

" We, Salman bin Hamad Al Khalifa, Ruler of Bahrain, testify " by this document that we have agreed with the Governor of St. " Helena upon the removal of the said persons from Bahrain to " St. Helena for the said period or until we agree to their return " to Bahrain.

" Executed this 26th day of December, 1956.

" (24th day of Jamadi Al Awal, 1376.) "

On December 28, 1956, the appellant and two of the other men convicted with him were delivered into the custody of the captain of *H.M.S. Loch Insh* under a warrant issued by the Ruler and, in fact, not delivered to the captain until that day, though bearing the date December 26, 1956. The warrant was in these terms:

" *To the Captain of H.M.S. ' Loch Insh ' Warrant*

" By this document we, Salman bin Hamad Al Khalifa Ruler " of Bahrain authorise you to receive and convey the following persons:

" Abdul Rahman Al Baker
" Abdul Aziz Al Shamlan
" Abdullah Al Aliwat

" from Bahrain to St. Helena and deliver them to the Governor of " the island or his representative.

"Executed this 26th day of December, 1956 (24th day of Jamadi Al Awal, 1376)."

On January 27, 1957, the appellant and the two others arrived at St. Helena in *H.M.S. Loch Insh* and were there delivered by the captain to the then Superintendent of Police and Prisons whom the Governor had empowered to receive them. The original warrant under which the appellant was brought from Bahrain to St. Helena had apparently been lost and he was now held in the custody of the second respondent under a warrant dated December 22, 1958, issued by the first respondent to the second respondent on his appointment as Superintendent of Gaols.

1960. April 26, 27, 28. *Walter Raeburn Q.C.*, *Roland Brown* and *Kenneth Polack* for the appellant. The short issue is whether the detention of the appellant is or is not unlawful. He has always maintained that he was innocent of the charges brought against him in the special court. Four points are taken; it is submitted (1) that the appellant was never amenable to the provisions of the Colonial Prisoners Removal Act, 1869, since he never was within the jurisdiction of the Crown. (2) Even if he was within the jurisdiction of the Crown, he never was a prisoner "under sentence" within the meaning of section 4 of the Act of 1869. (3) The legal machinery necessary to bring the Colonial Prisoners Removal Act into active operation was defective, and that Act never applied to Bahrain and never took legal effect there at all. There was no agreement between the Ruler and the Governor of St. Helena. (4) Even if that Act did take effect in Bahrain, the warrant under the authority of which the appellant was removed from Bahrain lacked the authority of the Act, and the detention was illegal ab initio.

On point (1) (supra), the Foreign Secretary's reply to the questions addressed to him by the Board pursuant to section 4 of the Foreign Jurisdiction Act, 1890, was to the effect that on December 19, 1956 (when the Extension and Sanction Orders were made) Her Majesty did have legislative jurisdiction in Bahrain to extend the Act of 1869 to Bahrain, and to exercise the powers conferred on her by that Act in relation, inter alia, to subjects of the Ruler of Bahrain or Qatar. [For the full terms of the reply see the judgment of the Board, post, pp. 804, 805.] The Foreign Secretary's answers are not, it is submitted, sufficient answers within the meaning of section 4 of the Act of 1890, or, taking them to be sufficient, they carry the matter no further than it was before: unless he went further and said that this jurisdiction included the appellant there is nothing there which binds this Board at all.

With regard to the second point—that the appellant was never a prisoner "under sentence"—the subject-matter of the Colonial Prisoners Removal Act in its original form was the removal from one British colony to another British colony of any prisoners "under sentence"; those are the vital words. This is a power which arises out of Her Majesty's jurisdiction exercised through Her Majesty's courts in the colonies. Any extension of the Colonial Prisoners Removal Act to a foreign country must of its nature be territorial only; the subject-matter of any Act extended by the Foreign Jurisdiction Act remains unchanged; that Act only extends to the extent of Her Majesty's jurisdiction, it does not enlarge it. When the Colonial Prisoners Removal Act was extended by the Foreign Jurisdiction Act to a foreign country, it would not apply to some court not a British court administering some quite different law; to hold otherwise would be an extension intrinsically of the very operation of the Act, and to apply it to persons to whom it was never intended to apply. "Prisoners "under sentence" must be construed in the context of persons under sentence by a court administering justice according to British notions. The appellant was not a prisoner under sentence because (a) on the true construction of the Colonial Prisoners Removal Act he must be someone who goes through a British court; and (b) he was not tried by a court recognised by English law as a court which had authority to try him.

The court which tried him had not, according to our law, jurisdiction to try him. This case never went through the British courts in any way whatever. It has not been dealt with in accordance with the Bahrain Order of 1952—it has not gone through the court for Bahrain (under article 68 (1)); the concurrence of the Political Resident has not been obtained (under article 67 (2)). Consequently, the appellant was never tried by the proper court, a court which had jurisdiction to try him; he has been denied the rights which by the exercise of Her Majesty's jurisdiction in Bahrain were his, and consequently the condemnation pronounced on him by the foreign court was not a sentence which would make him a prisoner "under sentence" within the meaning of section 4 of the Act of 1869. "Courts within the "general jurisdiction" in article 67 (2) of the Bahrain Order, so far as a Bahrain subject is concerned, would be one of the Ruler's general courts to which all cases go. The court before which the appellant came was not a court within the general jurisdiction within which he came; it was not really a court at all, but was no more than a kind of device for condemning the appellant under a cloak of legal form.

Further on this point, if the appellant ever was within the jurisdiction, then that jurisdiction in the circumstances of this case has been waived, and he falls outside the ambit of the Colonial Prisoners Removal Act for that reason too.

The third point—that the Colonial Prisoners Removal Act was never effectively brought into operation in Bahrain—relates to the question of the agreement between the Ruler and the Governor of St. Helena. There are three conditions precedent to that Act being brought into effective operation as opposed to being applied: (1) there must be an agreement entered into between the two colonial governors; (2) there must be a sanction by Her Majesty in Council to such agreement; and (3) there must be actual publication of the sanction. In this case the Order in Council on the face of it had sanctioned the agreement being entered into, and that Order in Council was, on December 28, 1956, eventually published in Bahrain. But the submission is that there was no such agreement ever entered into as is contemplated by the Act. The Order in Council was relating to something which was not an agreement; there was no evidence of any communication between the Ruler and the Governor of St. Helena; the Ruler approached Her Majesty's Government and the latter approached the Governor of St. Helena. On the true construction of section 4 of the Act of 1869 the agreement ought to be in writing and the necessary documents be signed by the respective governors; a mere unilateral declaration that an agreement has been made does not comply with the section. It is contemplated that the agreement should precede the sanction, although it is not suggested that Her Majesty cannot sanction in advance a proposed agreement, provided that an agreement is signed in those terms. In any case, the parties here were not ad idem. There being no agreement on which to found the sanction of the Crown, the Colonial Prisoners Removal Act was never effectively brought into operation in Bahrain.

The fourth and last point is, that whether or not the Act of 1869 was brought into effective operation, the authorities struck too soon and the detention of the appellant was unlawful ab initio. The warrant was executed on December 26, 1956, and on that date on any showing the Colonial Prisoners Removal Act was not in force in Bahrain—the Sanction Order was published there on December 28. Accordingly, the warrant when executed was invalid and inoperative; it had no legal effect, and it does not make it valid and operative to hand it to a person to whom it is addressed at some later date, because it is in itself a void document. It is submitted that section 37 of the Interpretation Act, 1889, does not apply. There appears to be no authority on this point except the negative authority of the Act of 1889. The warrant is the very foundation of the British authorities' right to take the appellant, and is the only authority on which the captain of the *Loch Insh* acted in taking him into custody. If that is so, the appellant was never lawfully handed over to the captain or lawfully detained from the beginning. This defect cannot be cured.

B. J. M. MacKenna Q.C. and *J. G. Le Quesne* for the respondents. The first argument for the appellant—that he was never amenable to the provisions of the Act of 1869 because he was never within the jurisdiction of the Crown—was supported by two propositions: (1) that Her Majesty lacked the legislative power to make a law in Bahrain which would provide for the removal from Bahrain to a place outside of a person who was a subject of the Ruler and who had been sentenced by the Ruler's court in Bahrain; (2) that Her Majesty, if she had that power, had not exercised it by the two Orders in Council—the Extension and the Sanction Orders. The short answer to those two propositions is that, whatever else the Foreign Secretary's letter tells one, it is that Her Majesty had sufficient legislative jurisdiction in Bahrain on and after December 18, 1956, to make the two Orders in Council. On that date she also had legislative power to extend the Act of 1869 in relation to subjects of the Ruler of Bahrain. Article 2 of the Extension Order extended the Act without any express limitation, and article 2 of the Sanction Order makes it equally clear that the two Orders in Council related to such persons as the appellant, that is, subjects of the Ruler who have been sentenced by the Ruler's courts. If the two Orders in Council purported to make it the law of Bahrain that the Ruler authorised the removal from Bahrain to St. Helena of persons like the appellant, who had been sentenced by the Ruler's court, it is an end of both propositions. On the question of onus of proof reference was made to *In re Corke*[1] and *Rex* v. *Governor of Brixton Prison, Ex parte Shure.*[2]

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[1] [1954] 1 W.L.R. 899; [1954] 2 All E.R. 440, D.C.

[2] [1926] 1 K.B. 127, D.C.

The appellant's second argument was that even if he was within the jurisdiction of the Crown he was not a prisoner "under "sentence" within the meaning of section 4 of the Act of 1869. That Act does not expressly provide that the sentence shall be one passed by the court established in the colony by Her Majesty; section 4 does not prescribe the court by which the sentence is to be passed. The word "sentence" is not expressly qualified by reference to one of Her Majesty's courts, and it is not necessary that that should be implied. It is sufficient to read it as a sentence recognised as valid by the law of the colony. It was also said for the appellant on this branch of the argument that even if the Act of 1869 as extended covered the case of a person sentenced by the Ruler's courts, the appellant had not been validly sentenced by the Ruler's court for a number of reasons. It was said that the Bahrain Order of 1952 gave a discretion to the court of Bahrain to decide whether a case falling within article 67 (2) should be tried by the Ruler's court. It is submitted (1) that no discretion is in fact given to any court whether or not to exercise the jurisdiction given by article 67 (2); and (2) if any court has that discretion it is the court empowered to try the case, the court within the general jurisdiction of which the accused is. The word "may" in article 67 (2) does not confer a discretion: *MacDougall* v. *Paterson.*[3] It was also said that the Ruler's court was not a court within the general jurisdiction of which the appellant was—that it was a special court established by the Ruler. The question is whether the Order of 1952 intended to exclude the possibility of trial by one of these special courts in a case where the Political Resident had concurred in the case being tried otherwise than by a joint court. It is submitted that the words "general jurisdiction" are used to distinguish the court referred to from the joint court established under article 67 (1)—"general jurisdiction" means the jurisdiction which is derived otherwise than from the provisions of article 67 (1).

With regard to the ad idem point, the submission is that the Governor of St. Helena and the Ruler were completely at one in desiring an agreement to be made relating to the imprisonment of the appellant. The agreement was made at the latest on December 26, certainly before December 28. The two documents, that of the Governor and that of the Ruler, did satisfy the requirements of section 4 of the Act of 1869; no more was required than that the governor of the colony should acknowledge by writing signed by him that the colony accepted the prisoners. The agreement was sufficiently general to satisfy the requirements of the Act of 1869; it was in accordance with the desire which the Governor and the Ruler had expressed in their addresses. The Sanction Order did sanction such an agreement. It is not necessary that the sanction should be given either before or after the two have reached agreement; Her Majesty in Council may give the approval in "blanket" form. It is reading too much into the section to say that sanction must be given to terms which are set out in detail—but that does not arise in this case. [Reference was made to the meaning of "sanction" in the Oxford English Dictionary.] The words of section 4 are equally satisfied by an approval which precedes the thing to be done or the recognition of a thing which has already been done. Removal cannot take place under the removal agreement until the Sanction Order has been published. That the two things have happened is enough, whatever the order.

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[3] (1851) 11 C.B. 755.

The fourth and last point for the appellant was that since the warrant was signed by the Ruler on December 26, and the Sanction Order was not published until December 28, the warrant was not a valid instrument. It was also said that the Sanction Order may not have been published in Bahrain until after the *Loch Insh* had sailed on December 28, and that that too was enough to invalidate the warrant. There are, in reply, two alternative views: (1) that the warrant was a perfectly effective instrument if it were *issued* after the publication in Bahrain of the Sanction Order, and it should be presumed in the absence of evidence to the contrary that it was issued in that way. (2) If the warrant was issued before publication of the Sanction Order it became an effective instrument on such publication—that would be at the latest at some time on December 28.

The purpose of the signature is simply to authenticate the document. A warrant does not take effect from the point of time when the signature is put on it; it takes effect from the date of issue. This warrant was not invalid because at the date when the Ruler put his signature to it the statutory Sanction Order had not yet been published in Bahrain. Official acts will be presumed in the absence of evidence to the contrary to have been performed in the proper manner and at the proper time: Halsbury's Laws of England, 3rd ed., vol. 15, p. 348; Broom's Legal Maxims, 9th ed., p. 609.

If it were to be held that there was no valid warrant the effect would be either (1) that the warrant was only to protect those who conveyed the prisoners from one colony to another, and the validity of the detention does not depend on the validity of the warrant, or (2) that the subsequent detention in St. Helena becomes illegal. The submission is that prima facie the Bahrain warrant had no other purpose than to protect the master of the ship or the person to whom it may be addressed. The gaoler at St. Helena does not act upon that warrant. On the true construction of the Act a valid warrant is not a condition precedent to legal detention after the prisoner had been brought to the island.

Raeburn Q.C. in reply. The warrant is a fundamental document which signifies not only the protection of the master of the ship, not only the authority of the receiving governor, but singles out the individual covered by the warrant for the purposes of the operation of the Colonial Prisoners Removal Act upon him; it is the foundation of the receiving governor's right to detain. Further, the warrant was never signed by the person who is authorised by section 5 of the Act of 1869 to sign it (the Governor) and so for that reason also is invalid.

The answers of the Foreign Secretary to the questions addressed to him by the Board in effect beg the whole question. The appellant, tried in the Ruler's court, was never within the sphere of influence of Her Majesty, and the Colonial Prisoners Removal Act did not apply to him.

The words "prisoners under sentence" refer to prisoners under sentence of what is recognised in a British possession as a criminal court of Her Majesty. Here the appellant was under sentence of the Ruler's court. When the Political Resident says that the accused can go to his own Ruler's court, Her Majesty waives her jurisdiction.

There should be an agreement in writing under the hands of the respective governors of the colonies; here, if there was an agreement, it was not testified under the hand of either. They were not ad idem.

June 1. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: The appeal was heard in the first instance by three of their Lordships [on March 14, 15, 16 and 17]. Mr. Raeburn, on behalf of the appellant, took a number of points, placing in the forefront of his argument the contention that on December 19, 1956, when the Extension Order and the Sanction Order were made, Her Majesty's jurisdiction in Bahrain did not include power to extend the Colonial Prisoners Removal Act to subjects of Bahrain or Qatar. It appeared to their Lordships that this contention raised questions as to the existence and extent of Her Majesty's jurisdiction in a foreign country (viz., Bahrain) which ought to be referred to the appropriate Secretary of State for decision under section 4 of the Foreign Jurisdiction Act, 1890, and, accordingly, after the conclusion of the first hearing their Lordships addressed to the Foreign Secretary the following two questions:

" 1. Did Her Majesty on 19th December, 1956, hold exercise " and enjoy legislative jurisdiction in Bahrain over persons being " subjects of the Ruler of Bahrain and/or Qatar?

" 2. If so, at what date did Her Majesty acquire such jurisdic- " tion and what was its extent? "

To these questions the Secretary of State by letter dated April 8, 1960, gave the following answers:

" 1. On 19th December, 1956, Her Majesty held exercised and " enjoyed legislative jurisdiction in Bahrain over subjects of the " Ruler of Bahrain and subjects of the Ruler of Qatar to the " extent indicated hereafter.

" 2. (*a*) The legislative jurisdiction held exercised and enjoyed " by Her Majesty over such persons has been acquired over a " period of years by treaty, grant, usage and other lawful means. " Certain changes in the extent of such jurisdiction were made in " 1952 and 1953 as a result of discussions with the Ruler of " Bahrain and effect was given to these changes by the Bahrain " Orders, 1952 to 1956, which were in force on 19th December, " 1956. The legislative jurisdiction held by Her Majesty and " thereby exercised and enjoyed over subjects of the Ruler of " Bahrain and subjects of the Ruler of Qatar on that date extended

" (i) to such persons in respect of all acts committed " by them on board British and certain other ships, as pro- " vided in Article 8 (3) of the Bahrain Order, 1952;

" (ii) to such persons in respect of all acts committed by " them on board British and certain other aircraft, as provided " in Article 8 (4) of the Bahrain Order, 1952;

" (iii) to Mixed Cases (that is to say, cases in which such " persons and 'persons subject to this Order' as defined in " Article 4 thereof, were parties), as provided in Part VIII of " the Bahrain Order, 1952;

" (iv) to any such person registered by Her Majesty's

"Political Agent at Bahrain as being in the regular service "of 'a person subject to this Order' as provided in Part VIII "of the Bahrain Order, 1952.

"(b) On 18th December, 1956, Her Majesty also acquired "legislative jurisdiction in Bahrain to extend the Colonial "Prisoners Removal Act, 1869, to Bahrain and to exercise the "powers conferred on Her by that Act in relation, inter alia, to "subjects of the Ruler of Bahrain and to subjects of the Ruler of "Qatar. On 19th December, 1956, Her Majesty exercised that "jurisdiction by making the Bahrain (Removal of Prisoners) "Order, 1956, and the Prisoners Removal (Bahrain and St. "Helena) Order, 1956."

Having regard to the language of section 4 of the Act of 1890, it is clear that these answers must be taken as finally deciding the questions raised for the purposes of the present proceedings.

In the circumstances it was thought right that the appeal should be reheard by five of their Lordships and in due course it was reheard accordingly.

At the rehearing the Secretary of State's answers necessarily defeated Mr. Raeburn's argument based on lack of jurisdiction, inasmuch as by virtue of section 4 of the Act of 1890 those answers had to be taken for the purposes of these proceedings as embodying a final decision to the effect that on December 19, 1956, Her Majesty did have legislative jurisdiction in Bahrain to extend the Act of 1869 to Bahrain, and to exercise the powers conferred on her by that Act in relation, inter alia, to subjects of the Ruler of Bahrain and to subjects of the Ruler of Qatar.

But, granting to the full Her Majesty's possession of the legislative jurisdiction described in the Secretary of State's answers, Mr. Raeburn contended that the removal of the appellant to St. Helena and his imprisonment there were nevertheless unlawful because the Act of 1869, albeit validly extended to subjects of Bahrain and Qatar by the Extension Order, and validly put into operation by the Sanction Order, never applied to the appellant for the reason that he was not a prisoner "under sentence" within the meaning of the Act of 1869. This contention was based on submissions to the effect that (i) the Act of 1869 in its application to British colonies is limited to the removal of prisoners under sentence as a result of their conviction by the courts of the colony from which it is sought to remove them, or, in other words, prisoners convicted by British courts; (ii) the extension of the Act of 1869 to a foreign country under the Act of 1890 as amended by the Act of 1913 only has the effect of enlarging the area in which the Act of 1869 is applicable, without altering its subject-matter—viz., the removal of prisoners under sentences imposed by British courts; and (iii) in the present case the appellant was not sentenced by a British court, but by a special court set up by the Ruler. This submission postulates the existence in the foreign country to which the Act of 1869 is extended of courts comparable to Her Britannic Majesty's courts constituted by the Bahrain Order of 1952 and invested with jurisdiction to try and sentence persons, or some particular class or classes of person, in the foreign country concerned, and limits the potential application of the Act of 1869 to prisoners so tried and sentenced by those courts. Their Lordships see no justification for so limiting the effect of the Act of 1869 as extended to a foreign country by the Act of 1890. The effect of such extension appears to their Lordships to be to put the foreign country from which prisoners under sentence may be removable in the same position as a British colony from which such prisoners may be removable under the Act of 1869, and to make removable from the foreign country concerned prisoners sentenced under the local law, and by the courts, of that country, just as the Act of 1869 makes removable from a British colony prisoners sentenced under the local law, and by the courts, of that colony. Their Lordships find nothing in the terms of the relevant Acts and Orders to warrant the restriction which Mr. Raeburn seeks to impose upon the scope of the Act of 1869 as applied to Bahrain by the Extension Order.

By way of alternative to, or qualification of, the foregoing submission Mr. Raeburn argued that at all events a person in order to be a prisoner "under sentence" within the meaning of the Act of 1869 as extended to Bahrain must have been sentenced by a court recognised by Her Majesty as competent to try and sentence him, and he said that the special court by which the appellant and his four associates were tried and sentenced did not answer this description. For the purposes of this argument Mr. Raeburn relied on the provisions of articles 67 and 68 in Part VIII of the Bahrain Order of 1952, the part relating to "Mixed Cases." As their Lordships understood his argument, he said that inasmuch as the criminal prosecution of the appellant in the present case included a charge of attempting to assassinate Sir Charles Belgrave (a person subject to the Order) it fell within the provisions of article 68 (1), but that it did not involve as parties both persons not subject to and persons subject to the Order and was therefore not a mixed case within article 67 (1);

and, accordingly, that the only court in which the appellant's case could properly have been tried, after being entertained by the court for Bahrain, was the joint court constituted under the provisions of article 67 (1), and not the special court before which the trial or purported trial in fact took place. Their Lordships have had great difficulty in following this argument. The jurisdiction of the Joint Court extends exclusively to the trial of mixed cases: see article 67 (1). If, therefore, the appellant's case was not a mixed case the Joint Court had no jurisdiction to try it. Moreover, there was no other court constituted by the Order by which he (being a person not subject to the Order) could be tried. Accordingly, on this footing the Ruler had jurisdiction to try him in the Ruler's own courts on the ground that all jurisdiction enjoyed by him as Ruler of Bahrain and not surrendered to Her Majesty remained vested in him.

If, on the other hand, the appellant's case was a mixed case, then with the concurrence of the Political Resident it could properly be tried by the Ruler's own court as the court within the general jurisdiction of which the accused (i.e., the appellant) was: see section 67 (2). Inasmuch as article 67 (2) provides that the Political Resident's concurrence may be given with respect to "any mixed case or class of mixed cases" their Lordships see no sufficient ground for rejecting as ineffective the standing notification issued by the Political Resident and dated February 2, 1953, whereby under article 67 (2) he signified his concurrence, pending further or other instructions, with the continuance of "the present "practice of Her Britannic Majesty's Court for Bahrain in dealing "with the following classes of mixed cases, that is to say:

"*Criminal cases*: A person not subject to the Order who is "alleged to have committed an offence in relation to a person "subject to the Order may be tried by the court within whose "jurisdiction the accused is."

It appears to their Lordships that article 68 (1) upon its true construction brings into the category of mixed cases any case in which a person not subject to the Order is alleged to have committed an offence in relation to a person subject to the Order. That seems to their Lordships sufficiently plain from the direction in article 68 (1) to the effect that subject to article 67 (2) such cases are to be sent to the Joint Court (which is exclusively concerned with mixed cases); and also by the reference to article 67 (2) (which likewise relates only to mixed cases) as applicable or potentially applicable to cases within section 68 (1). It may be open to doubt whether the inclusion of the attempted assassination of the

Adviser, amongst the multifarious charges brought against the appellant and his associates, sufficed to make this a mixed case by virtue of section 68 (1). But their Lordships are satisfied that, whether mixed or not, the appellant's case was properly brought before the special court set up by the Ruler, if a mixed case by virtue of article 67 (2) and the concurrence of the Political Resident expressed by the notification above referred to, or, if not a mixed case, by virtue of the residual jurisdiction enjoyed by the Ruler in cases not covered by the provisions of the Order. Their Lordships think it is clear that for the purposes of article 67 (2) the special court was a court within the general jurisdiction of which the appellant was.

Further, in support of the submission that the appellant was not a prisoner under sentence within the meaning of the Act of 1869, it was (their Lordships understood) at one stage suggested that the circumstances attending trial before the special court were such as to preclude its recognition as a valid judicial proceeding. This objection was not pressed, and their Lordships are satisfied that it is without substance.

Mr. Raeburn also relied on various procedural defects alleged to have attended the making and carrying into execution of the Sanction Order. It will be remembered that under the Act of 1869 the sanction of Her Majesty in Council to an agreement between two colonies may be obtained in the case of a colony having a legislative body on an address of such body to Her Majesty, and in the case of any colony not having a legislative body, on an address of the Governor of such colony. It will be remembered also that the Extension Order provided that in the application of the Act of 1869 to persons subject to the Bahrain Order, 1952, references to the Governor should be construed as references to the Political Resident, and in its application to other persons such references should be construed as references to the Ruler of Bahrain. Accordingly, it would appear that for the purpose of obtaining the Sanction Order addresses to Her Majesty by the Governor of St. Helena and by the Ruler were required. As already mentioned, the Sanction Order recited the presentation of such addresses. The document relied on as the address of the Governor of St. Helena is the document under his hand dated December 18, 1956, to which reference has already been made. The document relied on as the address of the Ruler is the document of the same date signed "Salman," which has also been referred to above. It will be observed that the addresses were thus made the day before the making of the Extension Order, and

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therefore before Her Majesty was in a position to make the Sanction Order. There is also reason to suppose that the addresses did not actually reach Her Majesty by the following day (viz., December 19) when the two Orders were made. But inasmuch as the Ruler's address was handed by the Adviser to the Political Resident as representing Her Majesty on December 18, it would seem that the date of its actual receipt in England is immaterial; and non constat that if Her Majesty had not actually received the Governor of St. Helena's address by December 19 she was not aware that it was in fact in existence and in course of transit. Their Lordships are of opinion that the sufficiency of the addresses is not to be impeached on the ground that they were made in contemplation of the making of the Extension Order as a necessary preliminary to the making of the Order sought by the addresses, or on the ground that they were not physically before Her Majesty by December 19. Indeed, it would be difficult and, as their Lordships think, improper for their Lordships to go behind the recital as to the presentation of the addresses contained in the Sanction Order. Their Lordships would add that, inasmuch as Her Majesty's jurisdiction to make the Extension Order and the Sanction Order did not depend on the existence at the time of making them of any particular prisoners under sentence, the fact that the addresses were presented and the Orders were made before the date of the conviction of the appellant and the other four men, though made a matter of comment on the appellant's side, is immaterial.

The next question calling for consideration is whether the sanction given by Her Majesty under the Sanction Order in order that the Ruler and the Governor of St. Helena might, in accordance with section 4 of the Act of 1869, enter into an agreement for the removal of prisoners (not being persons subject to the Bahrain Order, 1952) from Bahrain to St. Helena and for their return, was ever implemented by a concluded agreement to that effect between Bahrain and St. Helena "testified" for the purposes of the Act of 1869 by "a writing under the hand of" the Ruler as regards Bahrain, and of the Governor as regards St. Helena, as required by section 4 of that Act as adapted by the Extension Order. The documents relied on by the respondents as constituting such agreement consist of the Governor's dispatch of December 24, 1956, and the document headed "Agreement" dated December 26, 1956, and executed by the Ruler, to both of which reference has already been made. Mr. Raeburn contended that these documents did not constitute an agreement covered by the sanction given under the Sanction Order. At one stage he was disposed to argue that the Sanction Order postulated a written conditional agreement which was in existence at the date of the Sanction Order and would be brought into operation by virtue of the sanction thereby given. Mr. Raeburn did not, however, in the end seek to maintain this position, and their Lordships find no sufficient justification for it in the language of section 4 of the Act of 1869 or in that of the Sanction Order. Mr. Raeburn further conceded (as their Lordships understood his argument) that the agreement need not be contained in a single written instrument or be in any special form, and further, that if a concluded agreement could be spelt out of the Governor's dispatch of December 24, 1956, and the Ruler's "Agreement" of December 26, 1956, the Governor's execution of the former and the Ruler's execution of the latter sufficed to satisfy the requirement of the Act of 1869 to the effect that the agreement should be testified as mentioned in section 4 of that Act. But Mr. Raeburn contended that no concluded agreement can be spelt out of these two documents. He pointed out that the Ruler's "Agreement" relates to three named individuals (the appellant and two others), whereas the Governor's dispatch relates to "five Bahrain "subjects." It clearly was not necessary that the agreement entered into between the Governor and the Ruler under section 4 of the Act of 1869 and the Sanction Order should relate to specific individual prisoners, but there seems to their Lordships to be no reason why it should not do so, provided the persons specified were persons to whom section 4 of the Act of 1869 (as extended to Bahrain by the Extension Order) and the Sanction Order applied. But the question is whether the Governor's dispatch and the Ruler's "Agreement" failed to show the necessary consensus ad idem in that the former referred to "five Bahrain "subjects" and the latter to three named individuals. In their Lordships' view the reference in the Governor's dispatch to "the "proposed arrangements for the detention in St. Helena of five "Bahrain subjects after removal from Bahrain under the terms "of the Colonial Prisoners Removal Act, 1869," suffices to justify their Lordships in looking at the Extension Order, the Sanction Order, and the addresses pursuant to which the Sanction Order was made, for the purpose of identifying the persons described in the dispatch as "five Bahrain subjects." That brings in the reference in the first recital to the Governor's address to the Ruler's desire that arrangement should be made . . . "for removal "of certain prisoners from Bahrain to St. Helena." Having got

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so far, their Lordships think it legitimate to ascertain by extrinsic evidence the identity of the "certain prisoners" referred to in the recital, and this, of course, puts beyond question the identity of the appellant as one of the five persons mentioned in the Governor's dispatch, and as the first of the three persons (being three of the five) named in the Ruler's "Agreement." This conclusion on the question of identification is not, in their Lordships' view, affected by the circumstance that at the date of the Governor's address (viz., December 18, 1956), the five persons referred to were prisoners awaiting trial and not prisoners under sentence, or by the doubt whether the appellant was in fact a subject of Qatar as distinct from Bahrain. Apart from the question of identity thus disposed of, their Lordships see no sufficient ground for impeaching the validity or sufficiency of the agreement between the Ruler and the Governor. It is true that such agreement is in general terms and does not condescend to matters of administrative detail, but their Lordships see no ground for holding that the Act of 1869 or the Sanction Order demand anything more elaborate than this.

The last argument for the appellant which their Lordships find it necessary to notice concerns the warrant executed by the Ruler under which the appellant was delivered into the custody of the captain of the *Loch Insh*. That document bore date December 26, 1956 (that apparently being the date on which it was drawn up), whereas the Sanction Order, as provided by section 4 of the Act of 1869, did not come into force until it had been published in the colony to which it related, Bahrain, of course, being treated for this purpose as a colony by virtue of section 5 of the Act of 1890 as amended and of the Extension Order. The Sanction Order was in fact published in Bahrain on December 28, 1956, and thus came into force in Bahrain on that date. Mr. Raeburn claimed that in these circumstances the warrant was a nullity, because at the date when it was drawn up the Sanction Order upon which the power of the Governor (i.e., so far as Bahrain was concerned the Ruler) to sign the warrant under section 5 of the Act of 1869 depended, was not yet in force. Their Lordships cannot accept this contention. It appears to them that the critical date for this purpose was the date (viz., December 28) on which the warrant was put into operation by its delivery to the captain of the *Loch Insh* along with the three prisoners, and not the date on which it was penned or otherwise brought into existence in a physical sense. The matter can be tested by assuming that the warrant bore no date, but was proved to have been written before

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December 28, though not delivered to the captain of the ship until that date. In that state of facts their Lordships think that the date on which the warrant was delivered to the captain would have been the relevant date, the date on which it was written being immaterial; and their Lordships can draw no valid distinction between that hypothetical case and the case actually before them in which the earlier date appeared on the warrant.

A further argument was raised before their Lordships to the effect that as the serving of the warrant and the coming into force of the Sanction Order by publication in Bahrain took place on the same day (viz., December 28, 1956) the former might have preceded the latter event, so that it was not proved that, at the moment of time on December 28 on which the warrant was issued by service on the captain, the Ruler had power to serve it under section 5 of the Act of 1869. This point (as distinct from the point that the warrant was drawn up before December 28) does not appear to have been raised below, and inasmuch as it could only be resolved by evidence as to the precise moments of time at which the publication of the Order and the service of the warrant respectively took place, their Lordships do not think the appellant should be allowed to raise it now.

For all these reasons, which are substantially in accord with those given by the learned Chief Justice, though he lacked the guidance received by their Lordships from the Secretary of State on the question of jurisdiction, their Lordships are of opinion that this appeal fails and should be dismissed, and will humbly advise Her Majesty accordingly.

Solicitors: *Bernard Sheridan & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

ARBUCKLE SMITH & CO. LTD. . . . APPELLANTS; H. L. (Sc.)*

AND 1960

GREENOCK CORPORATION . . . . RESPONDENTS. *Jan.* 18, 19; *Feb.* 18.

Rating—Rateable occupation—Repairs to vacant property—Warehouse—Work on alterations—"Actual occupation"—Meaning—Local Government (Scotland) Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 43), *ss.* 243 (1), 379 (1)—*Valuation and Rating (Scotland) Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 60), *s.* 16 (1).

By section 16 (1) of the Valuation and Rating (Scotland) Act, 1956, the occupier of premises became responsible for paying all rates. By section 243 (1) of the Local Government (Scotland) Act, 1947, he is not liable for rates on premises which are "unlet, unoccupied and unfurnished throughout the whole year from Whitsunday to Whitsunday corresponding to or as nearly as may be "to the period for which the rate is levied." In section 379 (1) "occupier" is defined as "any person in the actual occupation of "land."

On March 1, 1957, a company bought a warehouse with a view to using it as a bonded store. Approval of such use by the Customs and Excise was necessary and was applied for, but before it could be granted considerable alterations in the premises were required, and from March 3, 1958, till June 16, 1958, the work was carried out. The company had not previously used the premises as a warehouse. The local authority claimed rates in respect of the premises for the year from Whitsunday, 1957, to Whitsunday, 1958:—

Held, on the footing that there was no difference between the laws of Scotland and England in the principles affecting rateable occupation, that during the material period the company was not in rateable occupation. The making of alterations with the intention of carrying on a business when they were completed did not constitute rateable occupation or "actual occupation" within the meaning of section 379 (1). There being no use of the premises according to their nature, there was no occupation attracting liability to rates (post, pp. 821, 824 and 829).

Mersey Docks and Harbour Board Trustees v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* (1865) 11 H.L.C. 443; and *Clyde Navigation Trustees* v. *Adamson* (1865) 4 Macq.H.L. 931 distinguished.

Hackney Borough Council v. *Metropolitan Asylums Board* (1924) 131 L.T. 136; 40 T.L.R. 645 questioned.

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* *Present*: VISCOUNT KILMUIR L.C., LORD REID, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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Decision of the Second Division of the Court of Session, 1958 S.C. 615 reversed.

APPEAL from the Second Division of the Court of Session.

This was an action for payment in which the respondents, the Greenock Corporation, as rating authority for the burgh of Greenock, sued the appellants, Arbuckle Smith & Co. Ltd., for payment of £2,141 13s. 4d. with interest in respect of rates claimed to be due by the appellants in respect of the year from Whitsunday, 1957, to Whitsunday, 1958. The appellants denied that the rates in question were due by them and tabled a plea to the relevancy of the respondents' averments, and also a plea to the effect that since the subjects in respect of which the rates were levied "were unlet, unoccupied and unfurnished within the "meaning of section 243 of the Local Government (Scotland) Act, "1947," throughout the year in question, there was no liability on them for rates. The respondents tabled pleas to the effect that the sum sued for was due and resting owing and that, as the defences were irrelevant, decree should be pronounced de plano in terms of the conclusions of the summons. There were also certain other pleas tabled for the parties, but these were not insisted on and this appeal is not concerned with them. By interlocutor dated March 25, 1959, the Lord Ordinary (Lord Guest), after a debate, sustained the respondents' plea to the relevancy of the defences and granted decree de plano in terms of the conclusions of the summons. The appellants reclaimed and by interlocutor dated June 18, 1959, their Lordships of the Second Division refused the appellants' motion for review and adhered to the Lord Ordinary's interlocutor. The appellants now submitted their Lordships' interlocutors for review and the respondents submitted that those interlocutors were well founded and should be affirmed by the House of Lords.

The facts, about which there was no dispute, were stated by Viscount Kilmuir L.C. as follows: The appellants purchased certain warehouse premises situated in Greenock with entry as at March 1, 1957, with a view to using them as a bonded store for spirits. Preliminary approval by H.M. Customs and Excise was granted on September 26, 1957. It was not permissible for the appellants so to use the premises until provisional approval of such use had been granted by H.M. Customs and Excise. The appellants applied for provisional approval on January 28, 1958. It was an essential preliminary to the grant of provisional approval that certain alterations to the premises should be carried out in order to make them secure in accordance with Customs regulations. The appellants commenced to carry out such alterations on March 3, 1958, and completed them on June 16, 1958. Provisional approval was granted by H.M. Customs and Excise on June 13, 1958, and thereafter the appellants commenced to use the premises as a bonded store. The appellants had never prior thereto—that is at any time during the relevant period of Whitsunday, 1957, to Whitsunday, 1958—used the premises as a bonded store or for any purpose of their business as warehousemen. They intended to occupy the premises when the alterations were complete and when H.M. Customs and Excise were satisfied with the security measures.

Alexander Thomson Q.C. (of the Scottish Bar), *Henry Keith* (of the English and Scottish Bars) and *David Widdicombe* (of the English Bar) for the appellant company. In acquiring these premises the only purpose of the appellants, who were warehousemen, was to use them in their business as a bonded store. For this purpose to be carried out it was necessary for them to make alterations and get them approved by the Customs and Excise. Activity in relation to the premises with the sole object of making them fit for the only use envisaged for them does not constitute the sort of actual user which is essential to rateable occupation, because, while the activities were so confined, the premises were not serving the purpose of the appellants as warehousemen, but were in an antecedent stage.

Before a tenant is obliged to pay occupier's rates he must be in rateable occupation. He must be an " occupier " as defined by section 379 (1) of the Local Government (Scotland) Act, 1947 —" in the actual occupation of land." The relevant section of the Act, section 222 (which imposed rates on owners and occupiers in equal proportions), has no previous history. Before the Act, if premises were unoccupied no occupier's rates were payable, but occupancy was not defined. If " unoccupied " meant something different from " not in rateable occupation," it would be hard to see what it did mean. One would have thought that if there was no rateable occupation there could be no liability to occupier's rates. There is no statutory definition of " rateable occupation " nor any authoritative judicial definition.

The essential elements of rateable occupation are that there should be (a) possession, (b) actual use, (c) occupation of a permanent character and (d) beneficial use: see Armour on Valuation of Property for Rating, 2nd ed. (1912), p. 187. Here the element of actual use was absent during the whole of the relevant period. See also *Reg.* v. *St. Pancras Assessment Committee.*[1] Ryde on Rating, 10th ed., p. 17, is in conformity with Armour's book.

There have been cases of buildings immediately capable of commercial use but not in fact put to commercial use, for example, vacant warehouses. But there is no authority dealing with a building which is being altered for future beneficial use and deciding whether or not that circumstance puts the owner into beneficial occupation. There is no question of rating an occupier during the rebuilding of premises at a time when there is nothing but a hole in the ground. It is not making a beneficial use of a building to buy it with a view to converting it to a beneficial use; it is not in such use until the conversion is complete. On the point now in question the law of Scotland and the law of England correspond, and there is authority in England that there is no rateable occupation while a building is in course of construction: *Mid-Northamptonshire Water Board* v. *Lee.*[2] As to *Hackney Borough Council* v. *Metropolitan Asylums Board,*[3] see Ryde on Rating, p. 22. It is in the appellants' favour because it indicates that the carrying on of alterations to premises does not in itself amount to actual user and that one must look to user for the purpose contemplated when the premises were acquired. Further, the ratepayers there had admittedly been in rateable occupation of the premises before the reconstruction began. That was not so in the present case and the appellants never during the relevant year used the premises for the purpose which they contemplated when they acquired them. There is no rateable occupation of premises unless the user which was contemplated and intended when the premises were acquired or retained was being enjoyed during the relevant rating year: *London County Council* v. *Hackney Borough Council.*[4]

Mersey Docks and Harbour Board Trustees v. *Cameron*[5] and *Clyde Navigation Trustees* v. *Adamson*[6] do not support the decision of the court below, since the hereditaments were clearly in actual beneficial use.

The mere doing of alterations to a holding in order to adapt it to a future use of value does not amount to the beneficial use

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[1] (1877) 2 Q.B.D. 381.

[2] [1958] A.C. 68, 87, 92 (H.L.); [1957] 2 W.L.R. 881; [1957] 2 All E.R. 143.

[3] (1924) 131 L.T. 136, 140; 40 T.L.R. 645.

[4] [1928] 2 K.B. 588, 593, 599; 44 T.L.R. 592.

[5] (1865) 11 H.L.C. 443, 460, 461.

[6] (1865) 4 Macq.H.L. 931.

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and enjoyment of the holding necessary to constitute rateable occupation so as to bring it within the Local Government (Scotland) Act, 1947. Where what is being done is merely to make alterations to a building, that building is not being used. One does not use an article when one is making or altering or adapting it to some other purpose. It is the same with a building. The whole concept of rating is that the person who is getting the use of the hereditaments as they stand should contribute to the rates. *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council*[7] is relied on. *Commercial Bank of Scotland* v. *Glasgow Corporation*[8] and *Co-operative Permanent Building Society* v. *Pinkerton*[9] were wrongly decided in principle. In the first case the court misunderstood and misapplied the English authorities.

The valuation of a hereditament is based on what a hypothetical tenant would give year by year because it is capable of yielding an annual benefit. The hypothetical tenant is paying for the revenue yield. Where there is admitted rateable occupation it does not matter whether the party in occupation is making the maximum profit or not, since he is in occupation and is making some beneficial use of the land. But where the question is whether the individual is in occupation in a rating sense, one must look at the revenue aspect of the matter to see whether he is in a position to profit by the revenue yield. If property is being adapted, the person who is doing that alone is not in beneficial occupation. The intention to use the adapted premises must be fulfilled within the relevant rating year. One must look at the state of the property as it is in the relevant rating year. not at what it is capable of becoming. Building sites are not rateable while the work is in progress: *London County Council* v. *Wilkins*.[10]

David Widdicombe following. In English law it has never been suggested in any of the cases that works in course of construction or buildings under structural alteration are in rateable occupation. The present question has never come up for decision.

One must distinguish acts of user appropriate to an occupier from other acts of user not appropriate to an occupier. The concept of rateable occupation contemplates acts of user relating to hereditaments in being as opposed to acts of user designed to bring a hereditament into existence. There is no fundamental distinction between rebuilding and structural alteration, though certain minor acts of alteration may be regarded as occupiers' acts.

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[7] [1944] K.B. 49; 60 T.L.R. 65; [1943] 2 All E.R. 65; (C.A.) [1944] K.B. 412, 414, 415; 60 T.L.R. 275; [1944] 1 All E.R. 436.

[8] 1925 S.L.T.(Sh.Ct.) 142.

[9] (1958) June 18, Glasgow Sheriff Court (unreported).

[10] [1957] A.C. 362, 380 (H.L.); [1956] 3 W.L.R. 505; [1956] 3 All E.R. 38.

As to the rating of premises which are incomplete or the subject of structural alterations, see section 38 of the Poor Law Amendment Act, 1868, and section 42 (2) (*b*) of the Local Government Act, 1948. Statutory support for the appellants' contentions is found in section 133 of the Lands Clauses Consolidation Act, 1845. In no decisions under that section is it suggested that rates are payable in the case of works under construction: see *East London Railway Co.* v. *Whitechurch*[11] and *Hall* v. *North British Railway Co.*[12]

Many exemptions and reliefs are granted by statute on the assumption that there is an existing building, for example, farm buildings and churches. Thus, on the respondents' view, such buildings might be rateable while they were in course of construction but exempt when completed, which would be absurd. Consider also the case of industrial hereditaments and of such constructions as sewers and lighthouses.

The assessment of rateable values assumes buildings in existence: see section 22 of the Rating and Valuation Act, 1925.

W. R. Grieve Q.C. and *Peter Maxwell* (both of the Scottish Bar) and *W. B. Harris* (of the English Bar) for the respondent corporation. The question is whether or no the appellants have stated a relevant defence. Their defence is simply in terms of section 243 of the Act of 1947 and, unless they can show that in terms of that section the premises were unoccupied, they have not discharged the onus on them in the sense that they must show that they come within the section.

The first move in rating a hereditament is to put it into the valuation roll, a necessary preliminary to its going onto the assessment roll, which is made up from the valuation roll. The next step is to send out a demand note. If these steps are taken without objection, section 233 (5) of the Act of 1947 makes the production of the assessment roll prima facie evidence of the validity of the rates therein mentioned.

Whether the premises are let or are furnished is a question of fact. So is the question whether they are unoccupied. If the owner is making use of his property, and that use is beneficial, there must be occupation, and the sort of use is irrelevant.

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[11] (1874) L.R. 7 H.L. 81.

[12] (1883) 10 R. 857, 861–862, 863.

Further, having regard to the work, the premises, in addition to being in the physical occupation of the appellants, were, in any event, occupied in the sense of rateable occupation at least from March 3, 1958, since the premises were capable of being used as a warehouse while the work was going on.

As to the meaning of "occupy" for the purposes of rating in Scotland, see Armour on Valuation of Property for Rating, p. 186, which particularises the only two elements in determining whether premises are occupied. There must be (1) actual possession which is (2) of a permanent character. See also pp. 187, 189, 190. "Use" and "occupancy" are not synonymous terms, but use is an element of occupation.

The essential condition of rateable occupation was settled by *Clyde Navigation Trustees* v. *Adamson* [13] and *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* [14] to the effect that occupation should be beneficial and valuable. In the present case it was fulfilled from March 3, 1958, to Whitsunday, 1958. The appellants made beneficial use of the premises and therefore they were in rateable occupation.

The question to be asked is: Would a hypothetical tenant pay any rent for this property? The property was a warehouse which was being altered to become a bonded warehouse. The hypothetical tenant could have used this warehouse and would have been prepared to pay rent for it. To make alterations to existing property is to make use of the property. It is true that these premises were not being used as a bonded warehouse, but the use contemplated by the Act need not be any particular use: see *Newcastle City Council* v. *Royal Newcastle Hospital*.[15]

The English cases referred to by the appellants are no help in considering section 243. *London County Council* v. *Hackney Borough Council* [16] is distinguishable on the facts. In that case the proprietors of the premises during the rating year concerned had no particular beneficial use of them in contemplation. The observations of Wright J. relied on by the appellants were not intended to be a statement of the law of general application apart from the particular facts of the case; if they were so intended, they were unsound in law and not supported by authority.

In the present case Lord Mackintosh in the court below was right when he said[17]: "It is, I think, the law of Scotland as well "as that of England that 'beneficial' in this connection does "not connote pecuniary profit. It is immaterial therefore that "the defenders were getting no money return from these premises "throughout the whole of the year in question. It is sufficient "that they were obtaining some advantage or benefit from their "occupancy of the premises and the use they were making of "them." Here all the required tests of actual occupation are fulfilled. While the alterations were being carried out, the premises were being occupied within section 243. The appellants were actually using the premises and were getting the benefit of their occupation. Admittedly, if premises are merely being maintained without any contemplated use, that is not actual occupation. But if what is done is not mere maintenance, but are acts which are designed to put the building into a proper state for a contemplated purpose which will be beneficial, then the building is in occupation and is rateable.

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[13] 4 Macq.H.L. 931.

[14] 11 H.L.C. 443, 461, 501.

[15] [1959] A.C. 248, 255 (P.C.); [1959] 2 W.L.R. 476; [1959] 1 All E.R. 734.

[16] [1928] 2 K.B. 588.

Their Lordships took time for consideration.

February 18. VISCOUNT KILMUIR L.C. My Lords, this is an appeal against an interlocutor of the Second Division of the Court of Session by which the court adhered to an interlocutor of the Lord Ordinary (Lord Guest) decerning against the appellants in terms of the first conclusion of the summons for payment to the respondents of £2,141 13s. 4d. [His Lordship stated the facts and continued:]

My Lords, liability for rates in Greenock depends upon section 16 (1) of the Valuation and Rating (Scotland) Act, 1956, which enacts: "In the year first commencing after the passing of this "Act and in every subsequent year every rate levied by a rating "authority shall be payable by occupiers only . . ." By section 379 (1) of the Act of 1947 "occupier" is defined as meaning "the tenant or sub-tenant or any person in the actual occupation "of land." Section 243 (1) of the Act of 1947 (as amended by the Act of 1956) enacts that, save as otherwise provided in a local Act, "any rate levied by the rating authority shall not be "payable in respect of lands and heritages if the lands and "heritages are unlet, unoccupied and unfurnished throughout the "whole of the year from Whitsunday to Whitsunday correspond- "ing to or as nearly as may be to the period for which the rate

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[17] 1958 S.C. 615, 628.

"is levied." We were assured that there is no relevant local Act.

The premises in question were admittedly unlet and unfurnished and the question is whether they were unoccupied in the sense used in the context of rating.

Lord Patrick thought that the word "actual" in section 379 (1) of the Act of 1947 had been used to make plain that the occupation which is necessary to make the occupier liable to pay rates is de facto occupation as opposed to de jure occupation, the kind of constructive occupation which might be held to flow from mere ownership of land. I am disposed to agree with him on this, and also when he says that for the purposes of the Act of 1947 an owner of land must have made some actual use of the premises in the relevant year before he can be called on to pay rates. The crucial question, however, is what kind of use is contemplated or, in other words, whether it is sufficient to make alterations with the intention of carrying on a business when the alterations are completed.

I do not think it is. I accept broadly the argument for the appellants which can be put in this way. The sole purpose of the appellants in acquiring the premises was to use them as a bonded store in connection with their business as warehousemen. The alterations were necessary in order that this purpose might, if the alterations were approved by the Customs and Excise, receive effect. Yet activity carried on in relation to premises, the sole object of which is to make the premises fit for the only use which is contemplated, does not amount to the kind of actual user as is essential to rateable occupation. So long as the activities were confined to making the premises fit for a contemplated purpose, the premises were not serving the appellants' purposes as warehousemen. The premises were not being applied to the purpose for which they existed but were in an antecedent stage. It must be remembered that under rating law it is open to the owner to sterilise a property—whether by leaving a house without furniture or otherwise—which is perfectly capable of being let for a valuable rent. If, therefore, there is no use of premises according to their nature I find it difficult to see how there is occupation attracting liability for rates.

The learned judges who considered this case in the Court of Session were obviously much impressed by the advantage which, in their view, the appellants would receive from altering the premises. I cannot, however, take their next step of saying that because it was an advantage to the appellants to alter the premises, therefore the appellants were making beneficial use of the premises. It is an undoubted advantage to the owner of an empty house to put on some slates and keep it weathertight, but the fact that he does so could not create rateable occupation where none existed. I cannot myself accept the view that when a person is repairing or altering something designed for a particular purpose, he is by that action making use of it. The learned Lords of Session were able to find support for their view in the decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees*[1] and *Clyde Navigation Trustees* v. *Adamson*.[2] With the greatest respect, I cannot find any. When I consider the use made of its premises by a docks and harbour board, I have no difficulty in recognising it as a full as well as a beneficial occupation, although the board is precluded from making a profit. In these cases the dock estates were clearly being used according to their natures and the decisions do not, in my view, help in the problem raised by the instant case.

As, however, reliance has been placed on certain English cases and everyone has treated the law of Scotland and the law of England as being the same on this point, I want to say that I do not think that they place any real difficulty in the way of the view which I have formed. It will be noted that in *Hackney Borough Council* v. *Metropolitan Asylums Board*[3] Lord Hewart indicated that the carrying out of alterations without more might not amount to rateable occupation. My difficulty is to perceive the relevance of the accumulation of small facts on which the decision that there was rateable occupation was reached. I do not think that the cases where the ratio decidendi was that the premises were in effect " stand-by " premises, such as *Borwick* v. *Southwark Corporation*[4] and *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council*,[5] help in the decision of this case. It follows that, in my view, the two cases in sheriff courts, *Commercial Bank of Scotland* v. *Glasgow Corporation*[6] and *Co-operative Permanent Building Society* v. *Pinkerton*,[7] were not rightly decided.

For all these reasons I would allow the appeal.

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[1] (1865) 11 H.L.C. 443.

[2] (1865) 4 Macq.H.L. 931.

[3] (1924) 131 L.T. 136; 40 T.L.R. 645.

[4] [1909] 1 K.B. 78.

[5] [1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 436.

[6] 1925 S.L.T.(Sh.Ct.) 142.

[7] (1958) June 18, Glasgow Sheriff Court (unreported).

LORD REID. My Lords, in this action the respondents sue for £2,141 13s. 4d., being rates due for the year from Whitsunday, 1957, to Whitsunday, 1958, in respect of warehouse premises at Ker Street, Greenock. The appellants acquired these premises in March, 1957, with a view to using them as a bonded warehouse. Before premises can be used for that purpose the requirements of H.M. Customs and Excise as to security must be satisfied. Preliminary approval of the premises was given in September, 1957, and alterations with a view to improving the security of the premises were made by the appellants between March 3 and June 16, 1958, whereupon provisional approval was given and the appellants were free to use the premises for their intended purpose.

The appellants' defence is that throughout the year in question the premises " were unlet, unoccupied and unfurnished within the " meaning of section 243 of the Local Government (Scotland) " Act, 1947." If that is established, then occupiers' rates are not payable. Owners' rates having been abolished in 1956, the whole sum now sued for represents occupiers' rates, and if the appellants' contention is correct it is a complete defence to this action.

The premises were unlet and it is now admitted that they were unfurnished throughout the year. The case turns on whether they were " unoccupied " throughout the year. The facts are not in dispute. The premises remained empty and the only operations carried out in them by the appellants during the year were some slight repairs to the roof in January and the alterations begun on March 3 and not completed by Whitsunday. These alterations comprised bricking up some windows and doors and fitting iron bars to some other windows.

The respondents do not attach importance to the repairs, but they maintain that by making these alterations the appellants occupied the premises. What, then, is the meaning of " un-" occupied " in the Act of 1947? There is no definition of the word, and the only assistance to be got from the Act is in the definition of " occupier " in section 379 (1) which includes " any " person in the actual occupation of land." Premises are therefore unoccupied unless there is " actual " occupation by somebody. But that does not throw much light on what is meant by " occupation ": it only excludes occupation which is not actual but only notional—if there can be such a thing as notional occupation.

There is singularly little authority in Scotland on the meaning of occupation and, apart from two sheriff court cases, there is none in point in this case. In England there is a wealth of authority, not always consistent, but again, with one possible exception, there is none exactly in point here. I therefore think it proper to begin by taking the word "unoccupied" as an ordinary word of the English language and considering its possible meanings. It could, I suppose, mean that no one ever set foot in the premises during the relevant period, but I reject that meaning at once, both because it has never even been suggested so far as I know in any authority or textbook, and because, very properly, it was not argued in this case. So if the owner can himself enter or send in others without thereby "occupying" the premises, the criterion of occupation must be either how frequently he or his representatives go in or what they do when they are here. No one has contended that entry for inspection or cleaning or ordinary maintenance such as heating in cold weather or carrying out ordinary repairs to make the premises wind- and water-tight constitutes occupation, and it appears to me that occupation must involve something more than that. But if that be so, I have difficulty in seeing on what reasonable principle the making of the alterations in this case can be held to constitute occupation. It might easily be necessary to do work not dissimilar in character and extent from that done here to make good doors and windows broken by natural or human agency. And, moreover, where fairly extensive repairs are necessary the old position is not always exactly restored: the opportunity is taken to carry them out in such a way as to make improvements. It would seem to me very odd if in such a case the criterion were whether or not the work done has improved the premises or made them more valuable to the owner.

But I can see a clear distinction between maintaining, repairing or improving a fabric, on the one hand, and enjoying the accommodation which it provides, on the other. And I think that it would accord with the ordinary use of language to say that the owner who in some way enjoys the accommodation is occupying the premises, but that the owner who merely maintains, repairs or improves his premises is not thereby occupying them: he is preparing for future occupation by himself, his tenant or his disponee.

It appears to me that the difficulty in this case arises from a misapplication of the requirement that, to be rateable, occupation must be beneficial. The argument is that if you find the owner making use of his property, and if that use is beneficial, then there must be occupation: the kind of use does not matter. But if the word "use" is used in that wide sense that argument must, I think, be wrong or at least too widely stated. If bricking up doors and windows is beneficial use, I do not see how it can be said that replacing or repairing broken doors and windows is not also beneficial use: the premises might be unusable until the repairs had been done. The real question in this case, to my mind, is not whether that kind of use was beneficial. It is whether that kind of use, beneficial or not, can amount to occupation.

A good deal was said in argument about the decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees*[8] and *Clyde Navigation Trustees* v. *Adamson*.[9] There statutory boards had made full use of their premises; they did all the things that a normal occupier would do, and the quality of their use was not in issue. Their case was that they did not have to pay rates because they were precluded from making profit. Their occupation was nevertheless held to be beneficial and rateable: it was beneficial because it was of property capable of yielding a net annual value. Since that time occupation of such property has been held rateable whether or not the occupier derives profit from it. But those cases throw no light on the question what kind of use amounts to occupation, and do not in the least support the fallacious argument: occupation to be rateable must be beneficial; these owners made beneficial use of their property; therefore they were in rateable occupation.

I do not propose to examine subsequent English authorities. They show that it may be difficult in particular cases to show whether there was such enjoyment of the property as to amount to occupation. But with one exception they do not involve the present question. The exception is *Hackney Borough Council* v. *Metropolitan Asylums Board*.[10] I find it somewhat difficult to determine the ratio decidendi, but it would seem to be that although individual acts of maintenance and improvement do not constitute occupation, an accumulation of such acts may do so. I would doubt that. But I think it unnecessary to decide that such an accumulation could never amount to occupation: it is sufficient to say that that could only be so in exceptional circumstances, and that there is nothing exceptional in the present case. It follows that, in my opinion, the two sheriff court cases—

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[8] 11 H.L.C. 443.

[9] 4 Macq.H.L. 931.

[10] 131 L.T. 136.

Commercial Bank of Scotland v. *Glasgow Corporation*[11] and *Co-operative Permanent Building Society* v. *Pinkerton*,[12] in Glasgow Sheriff Court on June 18, 1958—were wrongly decided. For the above reasons, I agree that this appeal should be allowed.

Lord Radcliffe. My Lords, we have here to consider the rateability of a warehouse owned by the appellants but not put to any use by them during the relevant year except so far as entry upon the premises by workmen, and the carrying out by them of alterations to the fabric, may constitute " use " for this purpose. The alterations were required in order to render the warehouse properly secure for service as a bonded store in accordance with Customs regulations. The specific items of work mentioned were the bricking up of certain windows and doors. I take it, therefore, that this is not a case of an existing building being reduced for the time being to an incomplete state by far-reaching structural alterations, but is a case of an existing building being subjected to certain modifications of its structure which, until completed, left it unfit for the intended business use.

It has been common ground that the appellants' claim not to be rated in respect of the premises depends upon section 243 (1) of the Local Government (Scotland) Act, 1947, the effect of which is to provide exemption from rates in respect of any hereditament which has been " unlet, unoccupied and unfurnished throughout the whole of the year from Whitsunday to Whitsunday corresponding to or as nearly as may be to the period for which the rate is levied." Certainly the warehouse was neither let nor furnished during the relevant period; but was it unoccupied? That rests upon the meaning which is to be attributed to the words " occupier " or " occupied " or " occupation " where they appear in the context of a rating enactment. In section 379 (1) of the same Act " occupier " is defined as meaning the tenant or sub-tenant or " any person in the actual occupation of land." In my opinion, the word " actual " has no particular significance here. The question is still, What is meant by " occupation " ? And that, I think, can only be answered by considering what acts, intentions or situations are requisite to constitute occupation for the purposes of rating.

Both the learned Lord Ordinary and the learned judges of the Second Division of the Court of Session treated the law of Scotland and the law of England as being the same on this point, though I have no doubt that differences between the two systems may lead to divergences in other respects. Consequently, English decisions were referred to so far as they threw any light upon the principles of law to be applied, though no English decision has dealt with a case precisely similar to that which is now before us. Having regard to the general link between the conceptions of rateability ruling in the two countries, which was confirmed by the successive decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* [13] and *Clyde Navigation Trustees* v. *Adamson*,[14] I should have been disposed in any event to consider the case on the same basis: but I am confirmed in this approach by my understanding that both of your Lordships who are trained in Scottish law take the same view as the Second Division upon this matter.

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[11] 1925 S.L.T.(Sh.Ct.) 142.

[12] (1958) unreported.

My Lords, I think that consideration of this case must begin by recognising that an empty dwelling-house is not rateable, and the owner of it is not regarded by the law as an occupier for rating purposes. It is no doubt something of a curiosity that the owner can by his own decision and for his own purposes withdraw from rateability a hereditament which may be of substantial annual value, and for which a tenant would readily give a profitable rent. But so it is, even though the principle of it puzzled so great an authority as Lord Blackburn (see *Harter* v. *Salford Overseers* [15]). Whether the rule is "in truth an exception from the general law "of rating" (*per* Lord Russell of Killowen in *Townley Mill Co. (1919) Ltd.* v. *Oldham Assessment Committee*,[16] it is nonetheless an established part of that law. It accords with the principle that, to be a rateable occupier, a person must enjoy some benefit from the land: his occupation must be "a thing of value." The explanation has been said to be that the owner of an empty house does not use it "as a house" within the meaning of the original Poor Relief Act of 1601 (see *per* Lord Atkinson in *Liverpool Corporation* v. *Chorley Union Assessment Committee* [17]); and it has been decided at various times that, while putting the owner's furniture in the house does set up rateability, presumably because some use of it as a house is being obtained, keeping a caretaker in the house merely as a custodian does not constitute occupation by the owner.

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[13] 11 H.L.C. 443.

[14] 4 Macq.H.L. 931.

[15] (1865) 6 B. & S. 591, 595.

[16] [1937] A.C. 419, 433 (H.L.); 53 T.L.R. 205; [1937] 1 All E.R. 11.

[17] [1913] A.C. 197, 211 (H.L.); 29 T.L.R. 246.

It is evident, therefore, that there will not be occupation in the context of rating unless some use is made of the hereditament in the course of the relevant year. "Use" is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed. When rating law turns its attention from dwelling-houses to industrial or commercial premises the same conceptions are, in my opinion, applicable to determine whether or not occupancy ceases or begins, though they must be adapted to the particular circumstances of such premises, factory or warehouse, and the business for the purpose of which they are created. Nevertheless, I think that the words of Farwell L.J. in *Rex* v. *Melladew*[18] provide a satisfactory indication of the correct test: "Rateable property has "many varieties; of some the normal use is by personal occupa- "tion, e.g., a dwelling-house, of others by occupation by live or "dead stock, e.g., a linhay used as a shelter for cattle, or a barn; "and the nature of the property and its mode of use must be "considered in each case. The test, in a case like the present, of "business premises, appears to me to be, Has the person to be "rated such use of the tenement as the nature of the tenement and "of the business connected with it renders it reasonable to infer "was fairly within his contemplation in taking or retaining it?"

Now, the appellants never used the warehouse in question here as a warehouse during 1957–58. That, I think, is the determining point. They did not buy it for any purpose of use except as a bonded store, and that only when their adaptations were complete and their licence permitted. This is not a case of a warehouse being kept empty in one year by its owner after it had been used as such by him in the previous year: nor is it one of those cases of "stand-by" premises such as were the subject of decision in *Borwick* v. *Southwark Corporation*[19] and *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council.*[20] Nor, again, is it a case of premises bought for one business purpose being, in fact, put to some other use. Here, if nothing more had been done than was done up to the date when the work of adaptation began, there would have been no question of rateable occupation. The whole issue is whether the acts that were done in carrying out these works amounted to such a use of the hereditament as set up an occupation within the year.

In my opinion, they did not. Since language is not a precise instrument, it is possible to say that there was use of the premises in the circumstance that they were entered and subjected to the work of adaptation. I do not think, however, that it is this sort of user that is relevant when the court is considering whether a warehouse was in rateable occupation. There was no enjoyment of the value of the building as a warehouse. Indeed, I do not see how adaptation work differs in its significance from current repair or maintenance work carried out for the purpose of keeping the building safe against wind and weather. If all that was done to or in an empty building was that workmen went in to effect such current repairs, I should have thought it rather extravagant to suggest that it thereby became occupied in the rating sense.

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[18] [1907] 1 K.B. 192, 203–204 (C.A.); 23 T.L.R. 207.

[19] [1909] 1 K.B. 78.

[20] [1944] K.B. 412.

Again, it is not, in my opinion, a correct, or, at any rate, a conclusive, test to determine whether an occupation was beneficial to inquire whether it suited the owner to have the work in question done or whether such work was to his advantage. Except in very special circumstances, it is to be assumed that it would be. But you could say as much about maintenance work. It prevents a loss of value to the owner just as adaptation or improvement should lead to an increment of value. These considerations, however, do not suffice to show that the occupation, assuming the acts to have amounted to such, was itself " a thing of value " during the year. Where there was no act of user of the warehouse for the business purpose for which it existed this requirement was not fulfilled.

It will appear from what I have said why I take the view that the judgments of the Lord Ordinary and of the Second Division of the Court of Session do not proceed on what is altogether the correct principle. For the same reasons I do not think that the two sheriff court cases to which we were referred, *Commercial Bank of Scotland* v. *Glasgow Corporation* [21] and *Co-operative Permanent Building Society* v. *Pinkerton*,[22] were rightly decided. The principle applied is entirely intelligible, but it is not, in my opinion, in accord with the proper conception of occupation in rating law.

The English decision which is closest to this case on its facts is *Hackney Borough Council* v. *Metropolitan Asylums Board*.[23] It is, however, impossible to refer to that case as an authority on any matter of principle, owing to the extreme ambiguity of the judgment of the Divisional Court delivered by Lord Hewart C.J. The

[21] 1925 S.L.T. (Sh.Ct.) 142.

[22] (1958) unreported.

[23] 131 L.T. 136.

most that can perhaps be inferred, for what it is worth, is that the court seems to have inclined to the view that there would not be occupation of an empty building during the period when nothing more was done in it than execute works of adaptation and reconstruction. What makes the decision unsatisfactory is that it is impossible to see upon what principle the comparatively trivial other acts upon the premises were held by the court to turn what would or might not otherwise have been rateable occupation into such an occupation. I cannot see what their significance was and I should be surprised if anyone else can.

I would allow the appeal.

LORD COHEN. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree and have little further to add. I have some difficulty in following the approach made by their Lordships of the Second Division to the question in this case, and in particular, to understand why those of their Lordships who gave opinions thought it necessary to consider whether the alterations that were made were beneficial, or of value, to the appellants. These premises could not be entered in the valuation roll unless they were capable of beneficial occupation. The annual value which was put upon them in the roll was the measure of the value of that occupation; in other words, it was, under section 6 of the Lands Valuation (Scotland) Act, 1854, the rent which a hypothetical tenant might be expected to give for them in their actual state, taking one year with another. But for assessment to rates there must be occupation. If, therefore, there were rateable occupation of the premises, that annual value supplied the basis of assessment for occupiers' rates. The assessment in the present instance must have been on that footing. If the appellants were in occupation they were in beneficial enjoyment of the premises, and it does not really matter what use they were making of the premises. In *Clyde Navigation Trustees* v. *Adamson* [24] the Clyde Navigation Trustees claimed that they were not in rateable occupation so as to be liable to be assessed to poor rates. This House and the Court of Session held that they were liable, and in the Court of Session [25] it was pointed out that it was only the assessor under the Lands Valuation Acts who could fix the value of that occupation. The question as I see it must

[24] (1863) 1 M. 974; 4 Macq.H.L. 931.

[25] 1 M. 974, 986.

always be: Was there such occupancy as would amount to enjoyment of the beneficial value of the subjects?

The question in this case is whether the appellants were in rateable occupation during any part of the rating year 1957–58. If their Lordships of the Second Division entertained the view that the appellants were in actual occupation, then there was no need to go on and consider whether that occupation was beneficial. That had already been fixed by the value in the valuation roll. But I think they may have meant that mere entry on the premises to make the alterations in question—which they called use or possession of the premises—was not enough unless that use was of value. Beneficial use, in other words, was necessary for actual occupation. I do not know that I would cavil at that proposition in this case, but I do not think that what was done here was beneficial use of the premises. The alterations were the same kind of alterations that might have been done in other circumstances by a tenant of premises, or by an owner-occupier in undoubted occupation of premises, but these would not add to his beneficial use or enjoyment, unless they were of such a character as added to the value of the premises, in which case they would, no doubt, be reflected in an increased valuation in the valuation roll. In that case, his beneficial use would be in the enjoyment of the increased value, not in the mere making of the alterations. In the premises here in question there could be no possible benefit, or enjoyment, from the alterations until the next rating year.

I can detect no difference between the law of Scotland and the law of England in the principles that affect rateable occupation, though the system by which rateable values are fixed may be somewhat different. The statute defines occupier as including any person "in the actual occupation" of land. It is difficult to know what significance was intended by the word "actual." The definition in the Act of 1947 is not new. It will be found in the Burgh Police (Scotland) Act, 1892. It may be intended to exclude the nominal occupation which may attach to an owner-occupier being entered, as I think is usual, in both the owner's and occupier's column of the valuation roll, irrespective of whether he is in actual occupation or not. But the point here is immaterial. The word "actual" cannot certainly weaken the criteria to be looked to in deciding whether there is rateable occupation. I cannot add to the views expressed in the speeches already

H. L. (Sc.)

1960

ARBUCKLE SMITH & CO. LTD. v. GREENOCK CORPORATION.

delivered that nothing points here to actual occupation of the premises in question.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Rees & Freres for Fraser, Stodart & Ballingall, W.S., Edinburgh; John Kennedy & Co. for the Town Clerk, Greenock.*

F. C.

[HOUSE OF LORDS.]

H. L. (Sc.)*

1960 *Feb.* 8, 9; *March* 10.

BELLSHILL AND MOSSEND CO-OPERATIVE SOCIETY LTD. . . . . . APPELLANTS;

AND

DALZIEL CO-OPERATIVE SOCIETY LTD. . RESPONDENTS.

Restraint of Trade—Arbitration award—Co-operative trading societies—Award under rules of union defining trading areas—Whether binding after society withdraws from union.

Trade Union—Membership—Termination—Whether arbitration award binding on member afterwards—Co-operative societies—Award defining trading areas.

Arbitration—Award—Frustration—Award under union rules—Whether binding on member after withdrawal from union—Co-operative societies—Award defining trading areas.

Two co-operative societies, registered under the Industrial and Provident Societies Act, 1893, and members of a co-operative union similarly registered, were in dispute as to their respective trading rights in a certain area, and submitted the dispute to arbitration under the rules of the union. These rules provided that one of the objects of the union was to act as arbiters in disputes between member societies, and that any disputes relating to overlapping should be submitted to arbitrators appointed by it, whose decision should be final and binding. The rules also provided that any member of the society might withdraw from the union by a written notice sent to its office. The award on the arbitration forbade trading in a certain area to one of the societies, which refused to comply and subsequently withdrew from the union.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD KEITH OF AVONHOLM and LORD DENNING.

Held, that on the society's withdrawal from the union the award ceased to bind it. It was unreasonable to suppose that a society joining the union and agreeing to submit its freedom of trading to arbitration, intended to bind itself for all time, whether or not it continued a member.

Birtley and District Co-operative Society v. *Windy Nook and District Industrial Co-operative Society* (*No. 2*) [1960] 2 Q.B. 1; [1959] 2 W.L.R. 415; [1959] 1 All E.R. 623 disapproved.

Decision of the First Division of the Court of Session, 1958 S.C. 400 affirmed.

APPEAL from the First Division of the Court of Session.

The appellants, Bellshill and Mossend Co-operative Society Ltd., and the respondents, Dalziel Co-operative Society Ltd., were each companies registered under the Industrial and Provident Societies Act, 1893, and were each co-operative societies, trading as such in Lanarkshire. In this action, begun on November 5, 1957, the appellants sought (1) declarator that the respondents were bound by an award made on October 6, 1955, by arbitration under rule 10 of the rules of the Co-operative Union Ltd., (2) declarator that the award prohibited the respondents from trading in a certain locality both from fixed premises and from mobile shops or vans, and (3) interdict against the respondents so trading in that locality. Interim interdict was also concluded for, but, after being refused by the Lord Ordinary, Lord Guest, on November 15, 1957, was not again applied for. The respondents tabled a plea to the competency of the action, which, having been repelled by the Lord Ordinary, was not argued in the court below and no question now arose in connection therewith. Each party tabled a plea to the relevancy of the other's averments. The respondents also tabled pleas to the effect: (1) that as the arbitrators had an interest in the dispute and were committed to a view thereon before their appointment, the award should be reduced, and (2) that the award should not be enforced since it was in restraint of trade. The appellants tabled a plea to the effect that the respondents were barred by mora, taciturnity and acquiescence from challenging the qualification of the arbitrators. Following a debate, the Lord Ordinary, by interlocutor dated July 25, 1958, sustained the appellants' plea that the defence was irrelevant, except as regarded the plea that the arbitrators were disqualified from acting through their alleged interest in and predetermination of the dispute, and he allowed a proof before answer confined to these two issues only. The grounds of the Lord Ordinary's decision appeared from his judgment, but, shortly stated, were to the effect that the respondents' argument could not be sustained without a plea that the award was ultra fines compromissi. The respondents reclaimed against this interlocutor and by minute of amendment tabled a further plea to the effect that, if the award fell to be construed as regulating the conduct of the respondents other than as members of the Co-operative Union Ltd., it was ultra fines compromissi and ultra vires and should, therefore, be reduced ope exceptionis. By interlocutor dated February 13, 1959, their Lordships of the First Division allowed the reclaiming motion, sustained the respondents' plea to the relevancy of the appellants' averments and dismissed the action. The respondents now submitted that this interlocutor was well founded in law and should be affirmed by the House of Lords. Alternatively, and in the event of its being held that their Lordships of the First Division erred in law, the respondents submitted that a proof before answer should be allowed on the averments relating to the respondents' pleas that the award was reducible in respect of the arbitrators' interest in and predetermination of the dispute.

The facts, stated by Viscount Simonds, were as follows: In and for some time prior to the month of October, 1955, the two co-operative societies, Bellshill and Dalziel, were in dispute as to their respective rights of trading in a certain area in the county of Lanark.

Both societies were members of another society called the Co-operative Union Ltd., whose objects were by its rules (rule 2) stated to be to carry on certain trades and business, amongst them that of "arbiters in matters of dispute arising "between societies which cannot be settled locally, and of propagating co-operative principles and ideas, and the organising of "co-operative work in all its branches, whether such work be "in connection with industries, trades, or business, or for the "promotion of education and other objects and purposes of a "similar character with a view to the ultimate establishment of "a Co-operative Commonwealth." Rule 6 provided: "The "union shall consist of all industrial and provident societies, joint "stock companies and other bodies corporate which have for their "object the promotion of co-operative principles and ideas, and "are members of the Co-operative Union" at the time therein stated or might thereafter be admitted. Rule 9 provided that each applicant for admission should "be deemed by such application to accept as the principles by which all its business "transactions shall be guided—the desire to promote the practice "of truthfulness, justice and economy in production and ex- "change" (amongst other means) "(3) By preventing the waste "of labour now caused by unregulated competition."

Rule 10: " . . . No society shall be allowed to remain in "membership with the union which does not abide by its rules, "conform to its aims, and accept the decisions of the central "executive confirmed by congress. Any disagreement that may "arise as to overlapping or any other matter which cannot be "settled in consultation between the parties shall, in failure of "conciliation, be submitted to persons appointed by the Co- "operative Union Ltd. as arbitrators, and their decision shall be "final and binding on all parties." Rule 12 (2): "Every society "shall, as long as it continues a member of the union, make an "annual contribution to the funds of the union . . ." Rule 15: "(1) A society may withdraw from the union . . ." [subject to the conditions therein stated]. "(4) A society which may by the "central executive be deemed guilty of conduct detrimental to "the union or to the movement generally, may be excluded "from the union by the resolution of any congress," as therein stated. Thus membership of the union was optional and could be terminated at any time either voluntarily or by exclusion.

It was common ground that these rules were binding on Bellshill and Dalziel as members of the union. In accordance with them a dispute between the parties in regard to overlapping by Dalziel into the territory of Bellshill was in May, 1955, referred (apparently by the union) to the arbitration of three persons nominated by the union who were in fact three of its officials. Both parties appeared in due course before the arbitrators, and on October 6 they made their award. It was that in relation to the dispute between Bellshill and Dalziel the co-operative service in the Bellshill area should be provided exclusively by Bellshill and Dalziel should not trade in this area from fixed premises therein nor from mobile shops or vans. The Bellshill area was defined. Dalziel did not accept the award and told Bellshill so. They did not observe it, and on October 21, 1957, withdrew from membership of the union, as they were well entitled to do. They continued to trade in the prohibited area.

Sir Frank Soskice Q.C. (of the English Bar) and *J. M. Robertson Q.C.* and *G. S. Gimson* (both of the Scottish Bar) for the appellants. The following propositions are relied on: (1) The award was made under contract, that is, under the rules of the union of which both societies were members when the award was made. (2) The award was made within the authority of the arbitrators and the courts will not sit in an appellate capacity on the merits of the award. (3) On the question of restraint of trade, if the award were manifestly unlawful and in restraint of trade it might be that the court would refuse to enforce it, but there is nothing here to show that this award was in unreasonable restraint of trade. (4) The averments show that it is a reasonable restraint of trade. (5) In any event, there is no room in the case of an award made pursuant to a contract for the application of the doctrine of unreasonable restraint of trade, so long as the contract to submit to arbitration is itself not in unreasonable restraint of trade. The onus is on the respondents to show that it is not in the interests of the public. (6) Rule 10 is not limited to the time of membership of the union, and the terms of an award may be applied after membership has ceased. (7) As to disqualification, the appellants rely on mora, taciturnity and acquiescence as barring the respondents from now being bound to complain of the qualifications of the arbitrators, even if there was disqualification, which is not admitted. The respondents did not resign until two years after the award was made.

Birtley and District Co-operative Society Ltd. v. *Windy Nook and District Industrial Co-operative Society Ltd. (No. 2)* [1] supports the submission that from the moment the union referred the matter to arbitration the parties were bound whether they ceased to be members or not. Rule 10, having regard, in particular, to its concluding words, is framed so as to authorise an award which is binding on the parties, not only during the period of their membership but also afterwards. See also the opening words of rule 12 (2). This award is expressed to be binding in perpetuity. It is complete and regular on the face of it, and it will not be reduced. Construing rule 10 in its context and in the light of the decisions, there is no time limit expressed, and no time limit should be imported into it by inference. The word "parties" in the rule means parties to the dispute, not members of the union. The appellants' contention is supported by *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.*[2] See also *Crediton Gas Co.* v. *Crediton Urban District Council* [3];

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[1] [1960] 2 Q.B. 1, 11; [1959] 2 W.L.R. 415; [1959] 1 All E.R. 623.

[2] (1873) L.R. 8 Ch. 942, 949–950, C.A.; (1875) L.R. 7 H.L. 550, 567.

[3] [1928] Ch. 447; 44 T.L.R. 369, C.A.

Winter Garden Theatre (London) Ltd. v. *Millennium Productions Ltd.*[4] and *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.*[5]

The rules are not concerned with trading in the same area but with a particular sort of trading—wasteful and unregulated trading (rule 9 (3)). The purpose of the union is to concern itself with policy generally. Admittedly, if the appellants had been expelled or had resigned under rule 15, they would not have come within the ambit of rule 10. The award would cease to have effect if they ceased to provide an efficient co-operative service within the area in question.

From the respondents' contention there results the absurdity of two parties going to arbitration in such circumstances that the losing party can render the award futile by resigning five minutes after it was made. It would also be unreasonable if it could resign two years afterwards so as to reap the goodwill built up by other co-operatives, say in a new town. If once a society gets into the area of an award, it is bound in perpetuity by that award, even after withdrawal from the union. The two cases cited by the Lord President on this point in the court below are not applicable. See also Bell on the Law of Arbitration in Scotland (2nd ed., 1887), pp. 74–75, para. 127, and Irons and Melville on Arbitration, p. 78. This award only keeps the respondents out of a certain area and the appellants' interpretation of the rules imposes no hardships.

Even if the House rejects this point, argument should be heard on the other pleas raised.

[VISCOUNT SIMONDS intimated that their Lordships would not do so.]

R. S. Johnston Q.C. and *Peter Maxwell* (both of the Scottish Bar) for the respondents were not called on to argue.

Their Lordships took time for consideration.

March 10. VISCOUNT SIMONDS stated the facts and continued: My Lords, on November 5, 1957, Bellshill commenced the action out of which this appeal arises. By the conclusions of their summons they sought, first, a declarator that the defenders were bound by the award of October 6, 1955; secondly, a declarator that the award prohibited Dalziel from trading in the defined area;

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[4] [1948] A.C. 173, H.L.; 63 T.L.R. 529; [1947] 2 All E.R. 331.

[5] [1955] 2 Q.B. 556; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.

and, thirdly, an interdict against Dalziel from carrying on such trade. It will be observed that declarator and interdict alike were based on the contention that the award not only operated while Dalziel was a member of the union but was permanent and unqualified. This contention is now opposed by Dalziel on two grounds, first, that upon its true construction the award is limited in its operation to the period of their membership of the union, and, secondly, that, if upon its true construction its operation is permanent, then it is ultra fines compromissi and is invalid. The first only of these grounds appears to have been urged before the Lord Ordinary, the second, which is embodied in the sixth plea-in-law for the defenders, having been added by leave before the First Division. Numerous other questions were raised and discussed, but I think it inexpedient to pronounce upon them, for I am satisfied, as I believe are all your Lordships, that the award cannot be upheld if it bears the meaning for which the appellants contend.

Whether or not it does bear that meaning is a matter upon which opinions may differ. For myself, applying the principles laid down in *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*[1] and numerous other cases that were cited to us and regarding the award not in vacuo but in relation to the rules under which the dispute was referred to arbitration, I should have no difficulty in concluding that it was operative against Dalziel only while they were members of the union. But if the opposite view is taken, I see no answer to the argument that the award is ultra vires. I assume that the parties were contractually bound to each other by the rules of the union and that rule 10 constituted a submission to arbitration upon (inter alia) any question of overlapping that was in dispute. Nothing can be clearer than that the parties, apart from the contract into which they had entered, could trade as and where they would and that when the contract was determined that freedom was restored. What effect, then, is to be given to the submission to arbitration of a dispute in regard to a prohibited area of trade? The answer is plain. I find in Bell's Treatise on the Law of Arbitration in Scotland (2nd ed., 1887) a passage at p. 75, para. 128, which is entirely apposite: "From the opinions "which have been delivered in some recent cases, respecting the "ancillary submission-clause it would appear that 'it is the "'natural construction of all such clauses, that, without very

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[1] (1875) L.R. 7 H.L. 550, H.L.

" 'express words, they are not to be carried beyond the term " 'for which the primary contract endures.' " In the present case there are no express words which suggest that a member of the union is to be restricted in its trading after it has ceased to be a member. On the contrary, the rules contemplate that it may cease voluntarily or involuntarily to be a member and by so doing escape the burden and lose the benefit of membership. If so, it is unreasonable to suppose that a society joining the union and thereby agreeing to submit its freedom of trading to arbitration intends to bind itself for all time whether or not it continues to be a member. I cannot express my view better than in the words of Lord Ivory in *Pearson* v. *Oswald*,[2] which the Lord President cites in the present case: " . . . this clause of " reference . . . is a subordinate contract entirely, ancillary to " the primary contract with which it is connected, and except " in so far as it is ancillary to the execution of that contract, " I do not think it has any legal existence whatever." Here the primary contract relates to competition between members of the union while they are members: to that contract the submission is ancillary: an award made upon it cannot validly carry the matter further.

Learned counsel for the appellants invited your Lordships to draw some inference favourable to his contention from the words at the end of rule 10, " their decision shall be final and binding " on all parties," and from the words in rule 12 (2): " Every " society shall, so long as it continues a member of the union " . . . ," but I am, for my part, unable to get the least assistance from them. They do not appear to me to touch the question that we must answer. It was natural that he should also rely on a case recently decided in England, *Birtley and District Co-operative Society Ltd.* v. *Windy Nook and District Industrial Co-operative Society Ltd.* (*No. 2*),[3] but upon that case I will only say that I concur in the Lord President's observations. I cannot regard the decision as correct.

At an earlier stage in this opinion I said that a number of other objections to the claim of Bellshill were raised by Dalziel. We were invited by counsel for Bellshill to hear and adjudicate upon these objections even though we should dispose of the appeal upon the grounds that I have discussed. This we declined to do, and I only mention the matter in order to make it clear that we heard no argument and therefore express no opinion upon them.

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[2] (1859) 21 D. 419, 426.

[3] [1960] 2 Q.B. 1; [1959] 2 W.L.R. 415; [1959] 1 All E.R. 623.

The appeal must, in my opinion, be dismissed with costs.

I am asked by my noble and learned friend, Lord Radcliffe, who is unable to be here today, to say that he has read and concurs in the opinion I have just delivered.

Lord Reid. My Lords, by becoming a member of the Co-operative Union the respondents agreed to be bound by the rules of that body. Under rule 9, " the principles by which all " its business transactions shall be guided " included (3), preventing " the waste of labour now caused by unregulated " competition." One of the methods of achieving this is by the prevention of " overlapping," that is, trading in the same area by more than one of the member societies. So the respondents agreed to limit their common law right as traders to carry on their trade wherever they desired to do so.

But rule 15 provides that a society may withdraw from the union and the respondents withdrew from the union in 1957. Thereafter they were free to carry on their business in any area, and this is admitted by the appellants with one exception. Rule 10 provides: ". . . Any disagreement that may arise as to " overlapping or any other matter which cannot be settled in " consultation between the parties shall, in failure of conciliation, " be submitted to persons appointed by the Co-operative Union " Ltd. as arbitrators and their decision shall be final and binding " on all parties." The appellants maintain that if a disagreement as to overlapping has been submitted to arbitrators in terms of this rule and the arbitrators decide that a society shall not trade in a particular area, as happened in this case, then that society remains bound by that award even after it has withdrawn from the union.

I cannot so interpret rule 10. Its purpose appears to me to be to facilitate the smooth working of rule 9 by providing a domestic tribunal to settle disputes between members. Admittedly, if a member society, anticipating an award against it, chooses to forestall proceedings under rule 10 by withdrawing from the union before the union steps in under this rule, the withdrawing society cannot be prevented from competing in the areas of societies which remain members. I find nothing to indicate that the fact that the union has stepped in makes a difference. The arbitration in this case was not preceded by a submission agreed by the parties—if it had been, much might have depended on the terms of the submission to which the respondents agreed. But the respondents' only agreement was its agreement as a member of the union to be bound by the rules of the union, and it could only be by virtue of the rules that the respondents could still be bound by the award made against them while they were members. The rules ceased to bind the respondents when they withdrew, and it would, in my opinion, at least require some very clear provision in the rules to render an award made under the rules effective after the rules themselves had ceased to be binding. I can find no such provision.

I am confirmed in my opinion by considering what would be the alternative. Is the award to be binding for ever? Counsel for the appellants was unable to support that view, or to maintain that the concluding words of rule 10—" their decision " shall be final and binding on all parties "—have that meaning. Counsel felt bound to admit that the award would cease to be binding if the appellants ceased to provide efficient co-operative service in the area from which the award excludes the respondents. And, if it had been the appellants and not the respondents who had withdrawn from the union, it surely would not be possible for a non-member to enforce against a member an award made under the rules of the union. I find it impossible to read into the rules or the award that the award is to cease to have effect in circumstances such as these but is otherwise to remain effective against a non-member.

It is unnecessary to consider the further question whether the award would in any event be unenforceable against the respondents as being in restraint of trade. I have not considered that question and I express no opinion on it.

In my judgment this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, I agree.

Lord Denning. My Lords, where two societies are in disagreement as to overlapping and the dispute is referred to arbitration under rule 10, it seems to me plain that any order made by the arbitrators delimiting trading areas can only apply so long as the two societies remain in membership with the union. The reason is because each society only subscribes to the principles of the union so long as it is a member, and must be taken to submit to the jurisdiction of the arbitrators only so long as it is a member. If it ceases to be a member, it is neither entitled to the benefits of the order nor bound by its obligations.

H. L. (Sc.)

1960

BELLSHILL AND MOSSEND CO-OPERATIVE SOCIETY LTD. *v.* DALZIEL CO-OPERATIVE SOCIETY LTD.

Lord Denning.

I can see grave objections to the arbitrators making a perpetual order restraining competition to continue beyond membership of the union. If such an order were to continue beyond membership of the union it would mean that the complaining society would be able to withdraw from the union, thus obtaining a free hand to compete within the territory of the defending society, and the latter would have no redress. Even during membership, the complaining society may serve the prohibited area so inefficiently that the prohibition should be removed. The changes in circumstances that may occur are so various that any order restraining competition, in order to be reasonable, must be capable of modification in the face of change. There must be "liberty to apply." And inasmuch as modifications can only be made during membership, the order must be limited to the period of membership.

It follows that I cannot agree with the decision of Streatfeild J. in *Birtley and District Co-operative Society* v. *Windy Nook and District Industrial Co-operative Society (No. 2)*[4] given on December 16, 1958.

I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Martin & Co. for Gray, Muirhead & Carmichael, W.S., Edinburgh, and Keyden, Strang & Co., Glasgow; Herbert Smith & Co. for Shepherd & Wedderburn, MacPherson & Mackay, W.S., Edinburgh.*

F. C.

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[4] [1960] 2 Q.B. 1.

J. C.*

1960 *April 26.*

MAPITIGAMA BUDDHARAKKITA THERO . APPELLANT;

AND

DON EDMUND WIJEWARDENA AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Buddhist law—Buddhist temple—Gift of land to, by will—Conveyance to high priest—"Management" entrusted to will trustees—High priest's claim to income—Meaning of "management"—Buddhist Temporalities Ordinance (c. 222, *Legislative Enactments of Ceylon*, 1938 *Rev.*), *s.* 20.

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* *Present:* VISCOUNT SIMONDS, LORD REID, LORD TUCKER and LORD DENNING.

J. C.

1960

THERO v. WIJEWARDENA.

Corporation—Corporation sole—Buddhist temple—Whether capable of owning property.

By section 4 of the Buddhist Temporalities Ordinance (c. 222 of the Legislative Enactments of Ceylon, 1938): "(1) The management of the property belonging to every temple . . . shall be vested "in a person . . . duly appointed trustee under the provisions of "this Ordinance." By section 20: "All property, movable and "immovable, belonging or in anywise appertaining to or appropriated to the use of any temple . . . shall vest in the trustee . . . "for the time being of such temple."

A testatrix, who died in 1940, by clause 5 of her will gave 250 acres of land "to the Raja Maha Vihare [Great Royal Temple], "Kelaniya. The selection of the 250 acres I leave to my executors "and the management of the same for the benefit of the said Vihare "I entrust to my trustees . . ." The trustees in 1942 executed a deed by which they conveyed the selected 250 acres to the then Viharadipathi (high priest or chief incumbent) of the temple and his successors in office, "subject always to the conditions in the said "will . . . that the management of the said property for the benefit "of the said Vihare shall be in the trustees in the said will." Thereafter, the trustees of the will managed the land, collecting the rents and profits from it, which they used for the purposes of the temple. On a claim made in 1954 by the appellant, the present high priest of the temple, that he was entitled to have the income from the land paid over to him, and that it was for him, and not for the will trustees, the respondents, to apply it as he, and not as they, thought fit for the purposes of the temple:—

Held, (1) that a Vihare (Buddhist temple) was not a juristic person—it was not a corporation and had no legal personality—and could not accept and own property, and, accordingly, the gift in the will of the 250 acres did not operate as an outright gift to the temple.

(2) The 250 acres did not vest in the appellant—who was himself the duly appointed trustee of the temple under the provisions of the Buddhist Temporalities Ordinance—by virtue of section 20 of that Ordinance. A Buddhist temple, not being a juristic person, could not have property belonging to it, and section 20 of the Ordinance must be read as dealing only with sanghika property, that is, it dealt only with property which had been dedicated to the sangha (priesthood) as a whole, with all the ceremonies and forms necessary to effect a dedication. The Ordinance did not apply to property which was vested in private trustees for the benefit of the temple as a charitable trust.

The word "management" in clause 5 of the will was not confined to management of the property strictly so called, but extended also to the management of the income, and, accordingly, the trustees of the will were the persons to decide how the income should be applied for the purposes of the temple.

Judgment of the Supreme Court of Ceylon (1957) 59 N.L.R. 121 affirmed.

J. C.
1960

THERO
v.
WIJEWARDENA.

APPEAL (No. 10 of 1959), by special leave, from a judgment and decree of the Supreme Court of Ceylon (June 18, 1957) reversing a judgment of the District Court of Colombo (July 6, 1955) in favour of the present appellant in an action brought by him against the respondents.

The following facts are taken from the judgment of the Judicial Committee: This case arose out of the will of Mrs. Helena Wijewardena, a widow who died on November 10, 1940. She took a great interest in a famous Buddhist temple at Kelaniya called the Raja Maha Vihare (Great Royal Temple) and by her will she gave 250 acres of land to it. The material gift was in clause 5: "I give 250 acres out of all that paddy field called "Kalawewa Farm situate in the North Central Province Ceylon "to the Raja Maha Vihare, Kelaniya. The selection of the "250 acres I leave to my executors and the management of "the same for the benefit of the said Vihare I entrust to my "trustees hereinafter named." Since her death the land had been managed by the trustees of her will. They had had possession of it and collected the rents and profits from it. They had used the income for the purposes of the temple, as for instance, in making improvements to it, paying the tom-tom beaters, and so forth. That went on for many years. But in 1954 the Viharadipathi (the high priest or chief incumbent) of the temple claimed that he was entitled to have from the trustees an account of the income they had received, and to have them pay to him the moneys in their hands, and furthermore, that he was entitled to possession of the land itself.

On July 6, 1955, the judge of the District Court (Sirimanne A.D.J.) held that the Viharadipathi was entitled to an account of the income and payment of it, but that he was not entitled to possession of the land. The trustees of the will appealed to the Supreme Court of Ceylon (Basnayake C.J. and Pulle J.), who on June 18, 1957, allowed the appeal and set aside the order of the District Court. The Viharadipathi now appealed to Her Majesty in Council. He accepted the decision that he was not entitled to possession of the land, but he claimed that he was entitled to have the income paid over to him.

1960. March 7, 8, 9. *John Pennycuick Q.C.* and *S. N. Bernstein* for the appellant. The gift, upon construction, is an outright gift to the institution consisting of the temple; it is a valid gift and it takes effect in accordance with the provisions of the Buddhist Temporalities Ordinance (c. 222, Legislative Enactments of Ceylon, 1938 Rev.), under which the income of the property is applicable by the Chief Priest—the appellant—for certain specified purposes connected with the temple. That view was accepted by the District Judge. The contention of the respondents—the trustees of the will—is that the gift takes effect as a charitable trust of income to be applied for the purposes of the temple by the trustees of the will. If the appellant is right, the income is payable to the Chief Priest to be applied by him as he thinks fit for the purposes of the temple. If the respondents are right, the income is applicable by the trustees as they think fit for the purposes of the temple. Who is to apply it may make a substantial difference as to how it is applied.

On the first point, that of the construction of clause 5, the submission is that according to the plain, natural meaning of the words they indicate an intention to give 250 acres outright to the temple. If a testator expresses himself as giving a certain item of property to any institution, then, in the absence of anything to the contrary, his intention is taken to be to give it outright to the institution which he names. It is not relevant what is the status of the institution. The provision for management bears the ordinary meaning such as any other will in the English language would bear, and the provision is that the trustees shall be responsible for the cultivation and letting of the property, etc.

If the appellant is wrong on construction, that is an end of the appeal; if he is right, the question then arises whether it is a valid gift and what its effect is. The submission is that a testamentary devise to this particular institution or to one of this type is valid. A temple may hold property. There can be no question, having regard to the terms of the Buddhist Temporalities Ordinance, that property may belong to a temple or be held in trust for the general purposes of the temple.

Next, a temple can acquire property by devise; there is nothing to the contrary in either the general law of Ceylon or in the Ordinance; on the contrary, there is to be found an earlier repealed section in Ordinance No. 8 of 1905 which leaves no doubt that that Ordinance recognised that property might be devised to a temple. The effect of this devise to the temple under the Ordinance is that the property vests in the Chief Priest for the time being, and he holds it on certain specified trusts. That was the view of the matter accepted by the District Judge. The

Supreme Court approached the case from a quite different point of view. They held, by reference to *Wickremesinghe* v. *Unnanse* [1] and the evidence given in that case, that property cannot be devised to a Buddhist temple because such a temple can only acquire property if certain formalities are complied with, which formalities would be impossible in the case of a devise. It is submitted that *Wickremesinghe's* case [1] was only concerned with gifts inter vivos and has nothing to do with a devise. There appears to be no authority on the point.

There is a balance of dicta in Ceylon against a Buddhist temple being a juristic person, but having regard to the terms of the Ordinance that is a matter of no importance in this particular case. The conclusion from the Ordinance is that property, including land, may belong to a temple. It is not said that the Ordinance supersedes the trust; one never gets to that position.

A devise to a temple is perfectly valid, and in the present case there can be no doubt that the intention of the giver was to give it to the institution and not to the bricks and mortar of the temple. The fact that the testatrix entrusted the management of this property to her trustees is not any sufficient indication to negative the ordinary plain meaning of the primary gift to the institution—an outright gift to which she attached the condition as to management.

There is no evidence in this case or in *Wickremesinghe's* case [1] which in any way indicates that formalities are required in the case of a gift devised by will. The Supreme Court held in that case that certain formalities are required for the effective dedication inter vivos of property to the temple and that only upon dedication in accordance with those formalities is the gift effective, and then the property becomes sanghika property. That is accepted, but it throws no light at all on the validity of a devise to a temple. The evidence that requires these formalities in the case of a gift inter vivos is not evidence that the same formalities are required for a devise. The effect of *Ranasinghe* v. *Dhammananda* [2] is that the priest for the time being can acquire land for the purposes of his temple by prescription; in that case plainly there was no ceremony or dedication, but the effect of the acquisition by prescription was to make the land land belonging to the temple and as such, it is submitted, within the scope of the Buddhist Temporalities Ordinance. The *Wickremesinghe* case[3] has from its very nature no application to acquisition by other methods, including particularly devise, but also prescription and purchase. No formalities are required for a devise, but in any case it does not matter, because the moment a testator is dead the property having been lawfully devised to or for the purposes of the temple becomes property belonging to the temple within the meaning of the Ordinance. " Sanghika " means no more than property belonging to the entire priesthood as distinguished from private property. *Charles* v. *Appu*[4] recognises that a temple can acquire property by means other than gift. What is said in F. A. Haley's Sinhalese Laws and Customs, pp. 530 and 558, and in Sir Ivor Jennings' Laws of the British Commonwealth, pp. 184 and 193, does not affect anything that has been submitted.

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[1] (1921) 22 N.L.R. 236.

[2] (1935) 37 N.L.R. 19, 21.

The true position is that in the case of a gift inter vivos the formalities are of the essence of the gift; unless they are performed, there is no gift and no passing of any interest in the property. The position is wholly different in the case of a devise by will; in such a case those formalities are not only inappropriate but impossible; the only formality required is a validly executed will, and then that will immediately on the death of the testator passes the beneficial interest in the property to the temple. The devised property here falls fairly and squarely within the terms of section 20 of the Ordinance as being property belonging to the temple, and it is not possible to write in any qualification as to sanghika—that is to contradict the statute. The sanghika point is really a false trail.

Under English law the effect of a gift to an existing charitable institution or society is well established: Tudor on Charities, 5th ed., pp. 118–119. That rule is in accordance with the proper principle to be adopted in relation to a gift in similar terms in the English language in Ceylon.

In *Charles* v. *Appu*[4] it was said that a temple is a corporation. There are a number of statements to the contrary in other cases and in textbooks, but it is submitted that the point does not arise. It is said in the respondents' printed case that " Clause 5 " of the will cannot in law be interpreted as a devise to the " fluctuating body of priests of the Raja Maha Vihare because " direct ownership of immovable property by a fluctuating and " unincorporate body of individuals became impossible after the " abolition of joint property in immovable property by section 7

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[3] 22 N.L.R. 236.

[4] (1914) 19 N.L.R. 242, 243.

"of the Wills Ordinance, No. 21 of 1844." The principle of law as to property held by several has no application to property subject to the Buddhist Temporalities Ordinance, which itself makes provision for the holding of property by a succession of trustees.

S. N. Bernstein followed.

Walter Jayawardene for the respondents. A direct gift to a temple, that is, without trustees, is not legally possible without the formalities, because a temple is not a juristic person. It is neither a corporation within the meaning of English law, nor is it otherwise a legal personality. It was admitted for the appellant that the balance of the authorities is in favour of the view that a temple is not a corporation; *Charles* v. *Appu*[4] is the only case which says that it is; apart from that judgment, there is no other case and no textbook to that effect. [Reference was made to the South African Law of Property, Family Relations and Succession, by R. W. Lee, 1954 ed., p. 188, s. 555.] The leading case in support of the view that a temple is not a juristic person is *Rathanapala Unanse* v. *Kewitiagala Unanse*,[5] and see also *Sadhananda Terunanse* v. *Sumanatissa*,[6] *Van Reeth* v. *De Silva*,[7] *Karthigasu Ambalawanar* v. *Subramaniar Kathiravelu*,[8] *Maraliya* v. *Gunasekera*,[9] *Gunaratne* v. *Punchibanda*,[10] and Lee's Roman-Dutch Law, 5th ed., p. 117, and the Digest of the Civil Law of Ceylon, by P. Arunachalam (1910), vol. I, p. 37.

The Buddhist Temporalities Ordinance, by section 20, vests in the trustees of the temple sanghika property, and until the property becomes sanghika they have no rights in it. Sanghika property is a very special kind of property known only to the Buddhist ecclesiastical law of Ceylon, and it can only be brought into existence in the manner known to and prescribed by that law. One cannot by the will turn or convert private property into sanghika property. [F. A. Haley, Sinhalese Laws and Customs, p. 318, was referred to.] The most important decision on the nature of sanghika property is *Saranankara Unnanse* v. *Indajoti*.[11] Haley, at p. 545, gives an account of what happened at the very start of these cases. The grant is not to a particular person, but to the priest in succession. *Wijewardene Nilame* v. *Naina Pulle*[12] is also relied on with regard to the intention to vest in the trustees under the Ordinance only such property as is sanghika. The Ordinance contemplated what is called strictly sanghika property; it did not intend to introduce a new way of creating sanghika property. Here, the property left by the will did not become sanghika, and therefore does not come within section 20 of the Ordinance. Intention to make it sanghika is shown by the use of the ceremonies: see *Fernando* v. *Jinalankara Tissa Thero*,[13] *Vajirawansa Thero* v. *Abraham Silva*[14] and *Dharmawansa Thero* v. *Ukku Banda*.[15]

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[4] 19 N.L.R. 242, 243.
[5] (1879) 2 Sup.Ct.Cir. 26, 27.
[6] (1934) 36 N.L.R. 422, 423.
[7] (1903) 8 N.L.R. 97, 100.
[8] (1924) 27 N.L.R. 15, 21.
[9] (1921) 23 N.L.R. 261, 264.
[10] (1927) 29 N.L.R. 249, 251.
[11] (1918) 20 N.L.R. 385, 394–395.
[12] (1915) 1 C.W.Rptr. 167, 168–169.

So there is here a grant to a temple which in law cannot take —a temple as such cannot hold property; and for that reason the words in clause 5, "I give to the temple," can only mean "I give for the benefit of the temple." The gift must be to trustees. and in clause 5 there are no other trustees except the trustees under the will—that is, the respondents and their predecessors. The position would be no different from any ordinary charitable trust. The object of the trust created by clause 5 is the temple in its ordinary and concrete sense, that is to say, the place of worship; and if the trust property were to vest in the temple trustee under section 20 of the Ordinance, its income could be spent on any of the purposes contained in section 25, some of which are quite unrelated to the object of the trust.

Pennycuick Q.C. replied.

April 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships must point out that there is no suggestion that the trustees of the will have mismanaged the property or misappropriated the funds. They have applied the income for the purposes of the temple: and in so far as this has been done with his consent or concurrence, the Viharadipathi does not seek to disturb it. But he seeks to obtain payment of any sums which were not paid out with his concurrence: and he does seek to have the income paid over to him for the future. He claims that it is for him to apply it as he thinks fit for the purposes of the temple: and not for the trustees of the will to do it. The District Court decided in favour of the Viharadipathi on this point, but the Supreme Court decided it in favour of the trustees of the will.

This issue depends largely on the true interpretation of the will. Mrs. Helena Wijewardena died on November 10, 1940. By

[13] (1945) 46 N.L.R. 519, 521.

[14] (1958) 60 N.L.R. 276, 277–278.

[15] (1959) 60 N.L.R. 350, 352.

her will she appointed her three sons to be her executors. The material gift was in clause 5: [His Lordship stated the terms of that clause and continued:] She afterwards, in clause 7, gave considerable property to her same three sons as trustees for certain charitable purposes which she specified, including restoration work at the Kelaniya Temple, aiding her poor relations and supporting Buddhist charitable institutions.

The executors seem to have assumed that, under the provisions contained in clause 5, it was their duty to convey the land to the Viharadipathi. Accordingly, they selected 250 acres out of the 1,000 acres of paddy fields: and on November 27, 1942, they executed a deed by which they conveyed it to the then Viharadipathi, the Reverend Mapitigama Dharmmarakkitha High Priest, and his successors in office, "subject always to the con-"ditions in the said will expressly contained, namely, that the "management of the said property for the benefit of the said "Vihare shall be in the trustees in the said will."

A serious question has now arisen as to the meaning of the word "management" in the will and in the deed: but their Lordships observe that for many years after the execution of that deed the trustees managed the 250 acres in this sense, that they not only collected the income from the 250 acres, but they also applied it as they thought fit for the purposes of the Vihare. The then Viharadipathi, the Reverend Mapitigama Dharmmarakkitha, died on July 19, 1947, and was succeeded by the Reverend Mapitigama Buddharakkita Thero, the plaintiff in this action. The trustees of the will continued to collect and apply the income as before. No complaint was made by the Viharadipathi until February, 1954, when his solicitor claimed the money in the hands of the trustees as income of the 250 acres.

Have the trustees of the will been doing wrong all these years in applying the income themselves for the purposes of the Vihare? That depends on the true interpretation of clause 5 of the will.

The Viharadipathi sought in his case before their Lordships to say that a Vihare (Buddhist temple) is a juristic person, and as such entitled to accept and own property: and that, accordingly, when the testatrix said: "I give 250 acres . . . to the Raja "Maha Vihare, Kelaniya." this operated as an outright gift to the temple. Their Lordships cannot accept this view. There is a long line of authority to show that a Buddhist temple is not a juristic person. It is not like the deity of a Hindu temple. It is not a corporation. It has no legal personality. The authorities to this effect are so numerous and so weighty that Mr.

Pennycuick before their Lordships did not feel able to controvert them.

The Viharadipathi next sought to say that, even though a Vihare is not a juristic person, nevertheless the 250 acres were vested in him, the Viharadipathi, by virtue of the Buddhist Temporalities Ordinance (chapter 222 of the Legislative Enactments of Ceylon, 1938). The material provisions of this Ordinance are as follows:

" 2. . . . ' temple ' means vihare . . . or any place of Buddhist " worship . . .

" 4. (1) The management of the property belonging to every " temple . . . shall be vested in a person . . . duly appointed " trustee under the provisions of this Ordinance. . . .

" 20. All property, movable and immovable, belonging or in " anywise appertaining to or appropriated to the use of any " temple . . . shall vest in the trustee . . . for the time being of " such temple. . . .

" 25. All issues rents moneys profits and offerings received by " any trustee for or on behalf of a temple shall with the sanction " of the public trustee be appropriated by such trustee for the " following purposes: [here are set out several purposes directly " connected with the temple, but also] (*d*) the promotion of educa- " tion. (*e*) . . . the customary hospitality to bhikkhus and " others. . . ."

The Viharadipathi is himself the trustee of the Raja Maha Vihare, duly appointed under the provisions of the Ordinance.

At first sight sections 4 and 20 do seem wide enough to cover property which is given by will to a temple, such as is contained in the first sentence of clause 5 of the will. Such property would seem to be " property belonging to " a temple. But their Lordships have come to the conclusion that this is not correct. If the definition of " temple " is written into section 20, we find that it says that all property belonging to a Vihare or any place of Buddhist worship shall vest in the trustee. But a vihare is not a juristic person. A place of Buddhist worship is not a juristic person. It cannot have property belonging to it. Some interpretation must be sought beyond the literal words. To what, then, does section 20 apply? The answer given by the Supreme Court of Ceylon was that it deals only with *sanghika* property which has been dedicated to the Sangha, that is, it deals only with property which has been dedicated to the priesthood as a whole, with all the ceremonies and forms necessary to effect a dedication.

but with special attention to the priests of a particular temple. Viewing the object and intent of the Ordinance, their Lordships think this is correct. Vast temporalities were granted in olden days by the Sinhalese kings to the Sangha (priesthood) of the ancient temples. These priests had renounced all worldly possessions and were unable adequately to protect and manage their properties. The Buddhist Temporalities Ordinance was passed so that trustees could be appointed to manage such properties. It did not apply at all to property which was vested in private trustees for the benefit of the temple as a charitable trust.

Mr. Pennycuick seemed disposed to concede that, so far as dispositions inter vivos were concerned, the Ordinance only applied to property which had been dedicated to the sangha with all the ceremonies and formalities necessary to effect a dedication: see *Wickremesinghe* v. *Unnanse* [1]: but he submitted that, so far as dispositions by will were concerned, there was no need for any ceremonies or formalities. No gift by will could ever take effect, he said, if such ceremonies or formalities were needed: because of necessity the donor was not able to be present to comply with them. Their Lordships realise the force of this contention, but they do not feel able to give effect to it. It must be remembered that it is only in comparatively recent times that a person in Ceylon has been permitted to dispose of property by will: and the legislature may well be presumed to have intended that gifts by will should take effect only under the Ordinances regulating wills and trusts and not under the Buddhist Temporalities Ordinance.

Their Lordships think that this can be tested by taking this very case: Under clause 5 of the will the testatrix clearly intended that the 250 acres should be managed by the trustees of the will: and that it should be applied for the purposes of this particular temple only. But if section 20 of the Ordinance applies so as to vest the 250 acres in the Viharadipathi, it would mean that the management of the property would be vested in him: see section 4 of the Ordinance; and the income could be applied, not only for the purposes of this particular temple, but also for the various purposes of section 25 of the Ordinance. Thus the provisions of clause 5 of the will would be overridden by the terms of the Ordinance. Their Lordships cannot agree to an interpretation of the Ordinance which would lead to this result.

Their Lordships are of opinion, therefore, that the 250 acres of land did not vest in the Viharadipathi by virtue of section 20 of the Buddhist Temporalities Ordinance.

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[1] (1921) 22 N.L.R. 236.

There remains a further point which was taken on behalf of the Viharadipathi. Even if the 250 acres did not come within the Ordinance, nevertheless the trust in the will must be given effect. On its proper construction it was, said Mr. Pennycuick, a gift for the general purposes of the temple. The temple was not merely a building. It was a charitable institution. A gift to it must be construed as a gift for the purposes of the institution which can and should be carried out by paying the income to the governing body of the institution. It was a valid charitable trust. The income should therefore, he said, be paid over to the Viharadipathi as the trustee of the temple.

Their Lordships feel the force of this argument, but they do not think it should be given effect. The effect of the first sentence in clause 5 of the will is cut down by the second sentence: " . . . " the management of the same for the benefit of the said Vihare I " entrust to my trustees." Their Lordships think that the word " management " in this sentence is not to be confined to management of the property strictly so called, that is, to the cultivation and letting of the land and the collection of the income. It extends also to the management of the income. The words " for " the benefit of the said Vihare " connote that the trustees are to consider the ways in which the Vihare should benefit. In short, that they should decide on the particular purposes to which the income should be applied. And their Lordships are the more disposed to accept this interpretation when they remember that for 12 years or more the parties have acted on that footing.

True it is that this means that there is no great distinction between the position of the trustees of the will under clause 5 and their position under clause 7, except that the purposes are different. But their Lordships feel it unnecessary to search for any further distinction. The intention of the testatrix may well have been to effect a distinction as to the purposes and nothing more.

In the result, their Lordships are of opinion that the trustees of the will are the persons to decide how the income should be applied for the purposes of the temple. They find themselves in agreement with the judgment of the Supreme Court of Ceylon. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Gaster & Turner; Darley, Cumberland & Co.*

C. C.

J. C.*

1960
July 27.

LAND COMMISSIONER . . . . . . APPELLANT;

AND

M. LADAMUTTU PILLAI KATHIRKAMAN PILLAI AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Land—Compulsory purchase—Agricultural land—Mortgage—Compliance with statutory requirements—"Debt" due under mortgage decree—Transfer of land to two transferees in satisfaction of debt due to one only—Invalid determination to acquire—Unjustified injunction to restrain acquisition—Appropriate procedure by way of certiorari—Land Commissioner not a corporation sole—Finality of determination—Land Redemption Ordinance, No. 61 *of* 1942, *s.* 3 (1) (*b*)—*Land Redemption* (*Amendment*) *Ordinance, No.* 62 *of* 1947, *s.* 3 (1) (*b*) (*c*)—*Land Acquisition Act, No.* 9 *of* 1950.

Ceylon — Land — Redemption — Agricultural land — Land Redemption Ordinance, No. 61 *of* 1942 (*as amended by No.* 62 *of* 1947), *s.* 3 (1) (*b*) (*c*).

Corporation—Corporation sole—Land Commissioner—Ceylon.

By section 3 of the Land Redemption Ordinance, 1942, of Ceylon: "(1) The Land Commissioner is hereby authorised to "acquire on behalf of Government the whole or any part of any "agricultural land, if the Land Commissioner is satisfied that that "land was, at any time" not earlier than January 1, 1929, "(*b*) transferred by the owner of the land to any other person in "satisfaction or part satisfaction of a debt which was due from "the owner to such other person and which was, immediately prior "to such transfer, secured by a mortgage of the land."

A, the owner of certain agricultural land—"the estate"—mortgaged it together with other lands to three persons, one of whom was B. The mortgagees were correal creditors. By a second mortgage A mortgaged lands, including the estate, to five persons, who included B and C. Thereafter B instituted proceedings against A, putting the second mortgage bond in suit, and obtained a decree. A deed of transfer was thereafter executed by A as vendor transferring the estate and certain other lands to B and C, the transfer being in the proportion of an undivided two-thirds share to B and an undivided one-third share to C. The deed recited that the consideration for the transfer was Rs. 75,000, but the attestation clause certified "that the full consideration . . . was set off "in full satisfaction of the claim and costs due" in the mortgage suit "and the principal and interest due on" the first mortgage bond (to which C was not a party). The Land Commissioner having made a determination under the Land Redemption Ordinance, 1942, to acquire "the estate," the plaintiff in the present suit, as a bona fide purchaser for value of the lands from the original transferees of the lands from A, claimed against the Attorney-General of Ceylon and "the Land Commissioner, "Colombo" an injunction restraining them jointly or, in the alternative, from taking steps under the Ordinance to acquire the lands.

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* *Present*: LORD TUCKER, LORD KEITH OF AVONHOLM, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, the RT. HON. L. M. D. DE SILVA.

At the trial of the action (by which date section 3 of the Ordinance of 1942 had been amended by additional provisions by Ordinance No. 62 of 1947) it was conceded that the Attorney-General could not be sued, and that the action against him should be dismissed. The trial judge having dismissed the action, an appeal to the Supreme Court was allowed, it being held, inter alia, that the Land Commissioner could be sued nomine officii, and that the action could also be maintained against the Attorney-General, and an injunction was issued restraining both defendants from taking steps to acquire the scheduled lands—which included other lands as well as the estate:—

Held, that the word "debt" in section 3 (1) (*b*) of the Ordinance of 1942 included a debt due under a mortgage decree founded on a mortgage bond; that the section was applicable where the lands transferred were some only of the lands secured by mortgage, and that the circumstance that B and C took undivided shares did not alter the fact that the land (which included the estate) was transferred by A within the meaning of the section.

Perera v. *Unantenna* (1953) 54 N.L.R. 457 approved.

The claim in the mortgage suit was, however, by B only, to whom and others the principal and interest were due on the first mortgage bond, C not being a party to it. Accordingly, although the land was transferred by A to B and C, it was not transferred in satisfaction of a debt due to B and C, but to B only, and the determination of the Land Commissioner was not therefore warranted by the provisions of the section which, being of an expropriatory nature (subject to compensation) must be construed strictly.

Although the Land Commissioner was not entitled to make the determination he did under section 3 (1) (*b*), the Supreme Court's judgment could not, however, stand, because, apart from the fact that the injunction dealt with other lands as well as the estate, it was against the Attorney-General, whereas it had been conceded at the trial that the action should be dismissed as against him. Further, the injunction as framed would prevent the Land Commissioner from making a new determination, and from endeavouring to justify it as being warranted by section 3 of the Ordinance of 1942 as amended by the Ordinance of 1947; and it also appeared to ignore the changes in regard to acquiring land which were effected by the Land Acquisition Act, 1950, as the result of which it did not lie with the Land Commissioner to "take steps" to acquire the land. It was not, however, in view of all the circumstances, appropriate, at this stage of the litigation, that some form of declaration of invalidity of the Land Commissioner's determination should be made, and the action must be dismissed.

If the authority of a Land Commissioner to make a determination under section 3 of the Land Redemption Ordinance was challenged the appropriate procedure was by way of an application for certiorari: *Leo* v. *Land Commissioner* (1955) 57 N.L.R. 178.

The Land Commissioner was not a corporation sole—he was not expressly so created by any legislative enactment, nor was it laid down that he might sue or be sued in a corporate name.

Mackenzie-Kennedy v. *Air Council* [1927] 2 K.B. 517; 43 T.L.R. 733, C.A. considered.

Any question of finality under section 3 (4) of the Ordinance of 1942 in a Land Commissioner's determination could only arise in regard to his exercise of individual judgment as to whether he should or should not acquire any land; the antecedent question as to whether any particular land was land which he was authorised to acquire under subsection (1) was not one for his final decision, but was for decision by the courts.

Judgment of the Supreme Court of Ceylon (1958) 59 N.L.R. 313 reversed.

Appeal (No. 39 of 1959) from a judgment and order of the Supreme Court of Ceylon (January 31, 1958) which by a majority (Basnayake C.J. and Pulle J., K. D. de Silva J. dissenting) allowed an appeal of the substituted plaintiff (the present first respondent) in the action from a judgment and decree of the District Court of Colombo (L. B. de Silva D.J.) (November 13, 1953) dismissing his action with costs. By their judgment and order the Supreme Court directed an injunction to issue in favour of the substituted plaintiff restraining the defendants from taking steps under the Land Redemption Ordinance, No. 61 of 1942, to acquire certain land. One of the main questions raised in this appeal was whether upon a proper interpretation of the provisions of section 3 of that Ordinance the Land Commissioner had the power to determine that the land in question should be acquired. Other questions in the appeal raised issues relating to the procedure followed and the remedies sought.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The second respondent, W. A. Don Elaris Perera, who for convenience may be referred to as Elaris, was formerly the owner of a number of different allotments of land. One of these, which consisted of several contiguous allotments amounting in total to approximately 42 acres in extent, was known as Keeriyankalliya estate. It may be referred to as the estate.

Elaris mortgaged this land (the estate) and also other lands. On September 30, 1925, by mortgage bond, No. 391 (P.1.), he mortgaged the estate together with certain other lands by a primary mortgage in favour of three mortgagees, one of whom was called Sockalingam, for Rs. 50,000. Elaris bound himself to repay that sum to the mortgagees or any one of them on demand. The mortgagees were correal creditors. On April 8, 1930, by a further mortgage bond, No. 533 (P.2), Elaris mortgaged certain lands which included the estate, in favour of five mortgagees for Rs. 25,000. One of those mortgagees was Sockalingam: another was a man called Sekappa. On March 8, 1931, by a further mortgage bond, No. 2339, Elaris mortgaged certain lands which included the estate in favour of a man called Dabarera for Rs. 20,000. It will be seen that the estate was common to all three mortgagees.

By a plaint dated January 31, 1933, Sockalingam instituted an action (Case No. 7365) against Elaris in the District Court of Negombo and joined Dabarera as a second defendant. By his plaint Sockalingam put the secondary bond (P.2) in suit and set out the amount which was owing by Elaris for principal and interest. Dabarera, as the holder of the mortgage created under bond No. 2339, was made a party in order that he should show cause why the mortgaged premises or any of them should not be sold so as to effect the recovery of the amount owing. Sockalingam claimed judgment for the principal and interest due under the mortgage bond (P.2) and, in default of payment, an order for the judicial sale of the land comprised in the mortgage and for an order that, if such sale did not yield sufficient to pay the principal and interest, Elaris should pay the amount of the deficiency with interest.

On June 23, 1933, a decree as asked for was entered in favour of Sockalingam: the sale of the land was to take place in default of payment within four months from the date of the decree.

By a deed of transfer, No. 4010, dated May 4, 1935 (P.5), Elaris as vendor transferred the estate and certain other lands to Sockalingam and Sekappa: the transfer was in the proportion of an undivided two-thirds share to Sockalingam and an undivided one-third share to Sekappa. The lands other than the estate were some but not all of the other lands covered by the first and second mortgages. The deed recited that the transfer was in consideration of the sum of Rs. 75,000. The attestation clause certified "that the full consideration above-"named was set off in full satisfaction of the claim and costs "due in Case No. 7365 D.C. Negombo and the principal and "interest due on mortgage bond No. 391 dated 30th September, 1925 . . . and that the vendor undertook to release the "lands appearing in this deed from tertiary mortgage bond "bearing No. 2339 dated 8th March, 1931."

Thereafter in October, 1940, Sockalingam transferred an undivided one-third share of the land which he had acquired under the transfer deed No. 4010 to the heirs of Muthiah (one of the correal creditors under mortgage P.2): Sockalingam transferred his remaining one-third share to Velayuthan (another of the correal creditors under mortgage P.2). In 1945 by deed No. 761 dated February 24, 1945, Sekappa, Velayuthan, and the heirs of Muthiah as vendors transferred the entire interest in the estate and the other lands which had been the subject of deed of transfer No. 4010: the transfer which was for a consideration of Rs. 75,000 was to Ladamuttu Pillai. He therefore became the sole owner of the estate and of the other lands which have been referred to above.

On May 16, 1945, Elaris made a request to the Land Commissioner to take action under the provisions of the Land Redemption Ordinance, No. 61 of 1942. Section 3 of that Ordinance was in the following terms:—

"3. (1) The Land Commissioner is hereby authorised to "acquire on behalf of Government the whole or any part of "any agricultural land, if the Land Commissioner is satisfied "that that land was, at any time before or after the date "appointed under section 1, but not earlier than the first day "of January 1929, either—

"(*a*) sold in execution of a mortgage decree, or

"(*b*) transferred by the owner of the land to any other "person in satisfaction or part satisfaction of a debt which "was due from the owner to such other person and which was, "immediately prior to such transfer, secured by a mortgage of "the land.

"(2) Every acquisition of land under subsection (1) shall "be effected in accordance with the provisions of subsection "(5) and shall be paid for out of funds provided for the purposes of this Ordinance under section 4.

"(3) No land shall be acquired under subsection (1) until "the funds necessary for the purpose of such acquisition have "been provided under section 4.

"(4) The question whether any land which the Land Commissioner is authorised to acquire under subsection (1) should "or should not be acquired shall, subject to any regulations "made in that behalf, be determined by the Land Commis-"sioner in the exercise of his individual judgment; and every "such determination of the Land Commissioner shall be final.

"(5) Where the Land Commissioner has determined that "any land shall be acquired for the purposes of this Ordinance, "the provisions of the Land Acquisition Ordinance, subject to "the exceptions, modifications and amendments set out in the "First Schedule, shall apply for the purposes of the acquisition "of that land; and any sum of money which may, under such "provisions be required to be paid or deposited by the Land "Commissioner or by Government by way of compensation, "costs or otherwise, shall be paid out of funds provided for "the purposes of this Ordinance under section 4."

The Land Commissioner asked Ladamuttu to show cause why the estate should not be acquired. Thereafter on May 12, 1947, the Land Commissioner made a "determination" to acquire the estate on behalf of the Government.

On July 3, 1947, by Ordinance No. 62 of 1947, certain amendments of the Land Redemption Ordinance, No. 61 of 1942, were made. By one amendment of section 3 of the last-mentioned Ordinance there was added immediately after clause (*b*) of subsection (1), the following:—

"(*c*) transferred by its owner or his executors or adminis-"trators to any other person, at the request of a mortgagee of "that land, in satisfaction or part satisfaction of a debt which "was due from that owner or his predecessor in title to that "mortgagee and which was secured by a mortgage of that land "subsisting immediately prior to the transfer.

"The preceding provisions of this subsection shall not apply "to such undivided shares of an agricultural land as were sold "or transferred within the period specified in those provisions "and in the circumstances and manner set out in any of the "preceding clauses (*a*), (*b*) and (*c*), but, where those shares "were converted after the sale or transfer into any divided "allotment or allotments by a partition decree of any court "or by a duly executed deed of partition, those provisions "shall apply to such allotment or allotments, and accordingly "the word 'land' occurring in this Ordinance shall be con-"strued to include such undivided shares which have been "converted after sale or transfer as aforesaid into any divided "allotment or allotments."

On February 7, 1949, Ladamuttu was notified of the determination of the Land Commissioner of May 12, 1947, to acquire the estate. Later Ladamuttu as plaintiff commenced an action in the District Court of Colombo against the Attorney-General of Ceylon and "The Land Commissioner, Colombo." By his plaint in the action filed on July 23, 1949, the plaintiff pleaded that he was a bona fide purchaser for value without notice and pleaded that the Land Commissioner had no power under Ordinance No. 61 of 1942 to acquire the lands from him and he claimed an injunction restraining the defendants jointly or in the alternative from taking steps under that Ordinance to acquire the lands. By their answer on March 2, 1950, the defendants asserted that the Land Commissioner had power to acquire the estate according to the provisions of section 3 of the Land Redemption Ordinance, No. 61 of 1942: they further pleaded as follows:—"the 2nd defendant's determination to acquire the "Keeriyankalliya estate under the provisions of the said Ordi-"nance is final and conclusive and cannot be questioned in "these proceedings and this court has therefore no jurisdiction "to entertain the present action."

On March 9, 1950, the Land Acquisition Act, No. 9 of 1950, was passed. The provisions of section 3, subsection (5), of the Land Redemption Ordinance, No. 61 of 1942, were amended. The Land Acquisition Ordinance (which had regulated the procedure of acquisition) was repealed and it was provided that where the Land Commissioner determines under section 3, subsection (4), of the Land Redemption Ordinance that any land should be acquired the purpose for which that land was to be required was deemed to be a public purpose and the provisions (with exceptions, substitutions and modifications) of the Land Acquisition Act were to apply for the purposes of the acquisition of that land. As a result of the amendments made by the Land Acquisition Act it was provided that "where the Land Commissioner determines that any land "shall be acquired for the purposes of the Land Redemption "Ordinance the Minister shall make a written declaration that "such land is needed for a purpose which is deemed to be a "public purpose and will be acquired under this Act and shall "direct the acquiring officer of the province or district in which "such land is situated to cause such declaration in the Sin-"halese, Tamil and English languages to be published in the "Gazette and exhibited in some conspicuous places on or near "such land." The "acquiring officer" with reference to any land meant the Government Agent of the province or the

Assistant Government Agent of the district in which that land was situated or any other prescribed officer.

The importance of those amendments was that consequent upon them it did not lie with the Land Commissioner after a determination by him under section 3 of the Land Redemption Ordinance to " take steps " to acquire the land.

Ladamuttu died in the early part of 1951, and on March 11, 1953, his son (to whom letters of administration had been granted) was substituted as the plaintiff in the action. Elaris petitioned to be added as a third defendant and was joined as the third defendant.

The action was tried in the District Court on September 30 and November 6, 1953. During the hearing it was stated on behalf of the substituted plaintiff that it was conceded that the Attorney-General could not be sued and that the action against him should be dismissed.

The district judge gave judgment on November 13, 1953, dismissing the action. He held that the Land Commissioner had had power to order the acquisition of the property. In the course of his judgment he said: " It was held in 54 N.L.R. " 457 [*Perera* v. *Unantenna*] that in spite of the entering of " a hypothecary decree, the debt is still due on the mortgage " for purposes of section 3 (1) (*b*) of the Land Redemption " Ordinance. The fact that the land was transferred in satis- " faction of two mortgage debts secured by this property, does " not take this case outside the provisions of this section.

" It was also argued that as secured lands were hypothe- " cated by these two bonds P.1 and P.2, only one of which " was transferred in satisfaction of the two debts the trans- " action fell outside the scope of this section. I am unable " to accept this contention. All that this section requires is " that the land sought to be acquired, should have been trans- " ferred in satisfaction or part satisfaction of the debt which " was due from the transferor to the transferee and that it " should have been secured by way of mortgage for such debt. " The fact that other lands were also bound by way of mortgage " for this debt is quite immaterial."

Questions arose as to whether the Land Commissioner could be sued as such and the judge held that he could. The issues framed during the trial and the answers given by the District Judge were as follows:—

" 1. Is the land in question capable of acquisition under "section 3 of the Land Redemption Ordinance, No. 61 of "1942?—Yes.

"2. Did the Land Commissioner on or about 12.5.47 make "a determination under section 3 (4) of the Land Redemption "Ordinance, No. 61 of 1942, that Kiriyankaduru (sic) Estate "be acquired?—Yes.

"3. Was the said estate on or about 12.5.47 a land of "the description contained in section 3 (1) (*b*) of the Land "Redemption Ordinance, No. 61 of 1942?—Yes.

"4. Is the Land Commissioner's determination with regard "to the acquisition of Kiriyankaduru Estate final?—His de-"cision on facts is final, the question of law whether he had "authority to acquire a particular land is subject to review "by this court.

"5. If so, can the correctness of the said determination "be questioned in these proceedings?—Vide answer to issue 4.

"6. Is plaintiff entitled to proceed against the 1st defendant "as representing the Crown to obtain an order of injunction "against the Crown?—No.

"7. Can plaintiff maintain this action against the 2nd de-"fendant as the Land Commissioner without suing the officer "who made the order in question by name?—Yes.

"8. Is the plaintiff a bona fide purchaser for value from "the original transferees of the said lands from the 3rd defen-"dant?—Yes.

"9. If so, is the 2nd defendant empowered to acquire lands "from him?—Yes."

From that judgment the substituted plaintiff appealed to the Supreme Court with the result, as stated above, that, by a majority, the appeal succeeded. In a careful and comprehensive judgment the Chief Justice held that the Land Commissioner had no authority in law to acquire the estate. He held that section 3 (1) (*b*) did not apply to a case in which the lands transferred were some only of lands secured by a mortgage. In dealing further with the provisions of section 3 (1) (*b*) the Chief Justice said[1]: "Learned counsel bases his "contention that the transfer P.5 does not fall within the "ambit of section 3 (1) (*b*) on the following considerations:— "(*a*) What was transferred was not the lands themselves but "undivided shares in the lands. The transfer of a land and "of an undivided share in a land is not the same. The section

[1] (1958) 59 N.L.R. 313, 319.

" contemplates transfer of a land or lands and not undivided " shares in a land or lands.

" (*b*) The transfer to Sekappa was not in satisfaction or " part satisfaction of a debt which was due from Elaris Perera " to Sekappa. It was in satisfaction of the debt due on bond " P.1 in favour of Sockalingam, Subramaniam and Arunasalam.

" The submission that the section applies only to the transfer " of the land securing the debt and not to the transfer of an " undivided share in it, is sound. The section refers to land " and not to undivided shares in land. An undivided share " in a land is not the same as the land itself and the transfer " of an undivided share in a land is not a transfer of the land. " Learned counsel for the Crown did not seriously resist this " argument.

" Learned counsel also submitted that once Sockalingam " instituted action for the recovery of the money due on bond " P.2, Sekappa who was party to that bond lost his right to " proceed against Elaris Perera, the obligation created thereby " being joint and several.

" It is correct that when one of joint and several creditors " institutes an action to recover a debt, payment to the other " co-creditors does not extinguish the debt. The moment " Sockalingam instituted the action on the bond Elaris Perera's " right to choose the co-creditor to whom he would pay the " debt ceased and his debt became payable to Sockalingam alone."

After referring to various authorities he continued [2]: " The " foregoing citations support learned counsel's contention that " Sekappa's right to claim the debt from Elaris Perera ceased " on the institution of the mortgage action by Sockalingam and " that the transfer to Sekappa was not therefore a transfer in " satisfaction or part satisfaction of a debt due from Elaris " Perera to Sekappa. Clearly then the transfer, apart from it " being a transfer of undivided shares, does not for this addi- " tional reason, come within the ambit of section 3 (1) (*b*)."

In regard to procedural matters the Chief Justice held that the Land Commissioner could be sued nomine officii and that action could also be maintained against the Attorney-General and that the court was entitled to consider whether the Land Commissioner had exceeded his powers under the Ordinance. Pulle J. delivered a judgment which was in accord with that of the Chief Justice. De Silva J. was of a different opinion. He held that it was not necessary that the land transferred should be co-extensive with the land secured by the mortgage. He further held that even though Sockalingam alone had sued on the mortgage bond P.2 Elaris did not cease to be indebted to Sekappa as a mortgagee under that mortgage bond. De Silva J. would therefore have dismissed the appeal as he considered that the substituted plaintiff had failed to establish that the land in question (the estate) did not come within the provisions of section 3 (1) (*b*).

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[2] 59 N.L.R. 321.

In the result the appeal was allowed and it was ordered "that judgment be entered for the substituted plaintiff directing[3] "that an injunction be issued restraining the defendants jointly "or in the alternative from taking steps under Ordinance 61 "of 1942 to acquire the lands described in the Schedule hereto." The Schedule described other lands as well as the estate.

1960. May 17, 18, 19, 23, 24, 25 and 26. *E. F. N. Gratiaen* (*Q.C.* Ceylon), *Walter Jayawardena* and *Dick Taverne* for the appellant. The general proposition is that it has not been proved at any time that the Land Commissioner had no authority to make a decision to acquire the estate on behalf of the Government under section 3 (1) of the Ordinance of 1942 as amended by the Ordinance of 1947. In any event, the plaintiff's action was misconceived in respect, first, of the party against whom the injunction was asked for, and secondly, that the remedy of injunction on the facts of this case is not available to the plaintiff in an action instituted against the Land Commissioner nomine officii.

In order to obtain the injunction the plaintiff had to satisfy the court that neither section 3 (1) (*b*) nor (*c*) applied, and he has failed to do so. The Land Commissioner could within the limits of his powers be satisfied that the case came under (*b*) or (*c*). All the other conditions of section 3 (1) (*b*) and (*c*) are satisfied, and if it was not a transfer to Sockalingam within the meaning of (*b*) it was a transfer at the request of Sockalingam within the meaning of (*c*). In support of that view it is submitted: (1) The estate was admittedly agricultural. (2) Five lands, including the estate, were transferred in their entirety in full satisfaction of two debts due to Sockalingam, namely, (a) the debt due to him as co-owner and creditor under the mortgage bond P.1, and (b) the judgment debt to him as sole judgment creditor under the mortgage decree P.4. (3) Each of those two debts was secured by a mortgage on each of the five lands, including the estate, and after the decree was entered the aggregate amount of both debts due by Elaris to Sockalingam was secured by mortgages of each land. (4) Each of the five lands, including the estate, was under Roman-Dutch law security for the repayment of the entirety of the aggregate amount of the debts due to Sockalingam under P.1 and P.4: *Appuhamy* v. *Gunasekera.*[4] (5) It is wrong to say that the mortgage created by the secondary bond, P.2, was discharged by the entering of the mortgage decree P.4: *Perera* v. *Unantenna.*[5] (6) As the whole five lands, including the estate, were transferred by Elaris in full satisfaction of the aggregate amount of both debts to Sockalingam under P.1 and P.4, each land was transferred in part satisfaction of the debts within the meaning of section 3 (1) (*b*) and (*c*). In connection with that proposition. and in the alternative, all five lands taken collectively were transferred in full satisfaction of the debts, and the estate formed part of that group of lands taken collectively within the meaning of section 3 (1).

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[3] 59 N.L.R. 321.

If the conveyance of the entirety of the estate had been made out in the name of Sockalingam alone section 3 (1) (*b*) would have been satisfied in every respect. On the facts of this case the fact that it was made out in the names of Sockalingam and Sekappa does not take the transaction out of section 3 (1) (*b*). The conveyance in the names of Sockalingam and Sekappa in exchange for the release by Sockalingam of both debts had the same effect in this context. Having regard to the legislative plan, the language of section 3 (1) (*b*) does not compel the interpretation which Basnayake C.J. preferred, namely, one which restricts the operation of the section, first, to a voluntary transfer of all the mortgaged lands in satisfaction of the secured debt. Nor does it restrict the operation of the section to a voluntary transfer in favour of a single transferee. Nor does it restrict its operation to judgment debts incurred under a mortgage decree for the recovery of the contractual mortgage debt. The operation of the section is not restricted to contractual debts secured by mortgage, but is wide enough to catch up judgment debts.

It is implicit in the language of the Mortgage Ordinance (Legislative Enactments of Ceylon, 1938 Rev., c. 74, ss. 2, 12 (1)) that the mortgage is still in force when the court orders a judicial sale: on the authorities the mortgage remains intact until the judicial sale is complete: *Madar Lebbe* v. *Nagamma*,[6] which has been followed in later cases: *Ramanathan Chetty* v. *Cassim* [7]; *Perera* v. *Unantenna*.[8] The view that the mortgage is not extinguished merely by the decree is also in accordance with Roman-Dutch law: Lee and Honoré on the South African Law of Property, Family Relations and Succession (1954), p. 55; Wille's Principles of South African Law, 2nd ed., Ch. 24, pt. 3. In support of the proposition that each of the mortgaged properties is security for the whole debt, and therefore the transfer of only one would come within section 3 (1) (*b*), see *Appuhamy* v. *Gunasekera*.[9]

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[4] (1916) 19 N.L.R. 266.

[5] (1953) 54 N.L.R. 457.

In this context there is a transfer to the creditor Sockalingam. There is a transfer to a secured creditor within the meaning of section 3 (1) (*b*) if by granting an effective discharge of the secured debt, and by thereby providing the entire consideration for the transfer, he procures a transfer of the mortgaged property by the debtor in a conveyance made out either in his own name or in the name of a person nominated by him, or partly in his own name and partly in the name of his nominee—the latter not providing any part of the consideration. If the conveyance had been in the name of Sockalingam alone it would completely have come within section 3 (1) (*b*).

Next, even if there were a doubt as to the applicability of (*b*), the 1947 amendment, which enacts section 3 (1) (*c*), is conclusive on the point, and, therefore, an injunction or even any other or further relief based on the submission that this property is in fact immune from acquisition under the Ordinance is not available. Section 3 (1) (*c*) is clearly open to the view formed by the Land Commissioner—that the estate had been transferred by Elaris to two other persons, Sockalingam and Sekappa, at the request of Sockalingam, who was the mortgagee of the land under P.1 and P.4, in part satisfaction of the debts. The proviso to (*c*) really makes perfectly clear what, it is submitted, is already clear under (*a*) and (*b*), namely, that the provisions of any part of section 3 do not apply to undivided shares.

The submission on procedural technicalities is, that if the plaintiff were content to attack the particular decision the appropriate remedy would be certiorari. Here the wrong remedy has been asked for and the wrong person sued. On the question whether the Land Commissioner could be sued nomine officii, it is submitted: (1) He was not created a corporation either expressly or by necessary implication under the Land Development Ordinance, c. 320. (2) Even if he was a corporation in respect of his powers under that Ordinance, he was not a corporation and liable to be sued as such in respect of the statutory powers conferred on him by the Land Redemption Ordinance of 1942. It is accepted that an individual public officer may even by necessary implication in a certain context be created a corporation. One must examine the particular statute which creates the office. In the Ordinance of 1942 the Land Commissioner had been expressly defined to mean not the Land Commissioner as a corporation, but the individual officer for the time being performing those functions: section 9 of the Ordinance. (3) Even if he is a corporation he cannot be sued except as an individual for an injunction which is asked for on the basis that he has exceeded his statutory powers. If a public officer violates the rights of individuals in supposed performance of his statutory powers he is liable to be sued as an individual—any action would be on the basis that he had gone clean outside his statutory powers. If an injunction can issue, it must be treated as one against the individual who made the order, and it does not bind the Crown or any subsequent officers.

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[6] (1902) 6 N.L.R. 21, 23.

[7] (1911) 14 N.L.R. 177, 180.

[8] 54 N.L.R. 457.

[9] 19 N.L.R. 266.

The question of the availability and appropriateness of the remedy must depend on whether an injunction could only be obtained against the Land Commissioner personally. Here the remedy is inappropriate, the injunction is against him as a public officer, and that is not available. Further, the injunction against him as an official is inappropriate because there is nothing for him to do and, therefore, no act to restrain. Further, the plaintiff is in effect asking for a declaration that the land is completely immune from acquisition under any provision of the Land Redemption Ordinance. If such a declaratory decree had been sought, it should have been asked for against the Crown. With regard to the limited scope of the availability of the remedy of an injunction against a person who is a public officer, see *Colombo Electric Tramway Co.* v. *Attorney-General*,[10] *Raleigh* v. *Goschen*,[11] *Nireaha Tamaki* v. *Baker*[12]—which is authority for the proposition that when a public officer, in supposed performance of a statutory power which does not exist, does some act which interferes with private rights, there is available an action for a declaration against him, and an injunction against him sued as an individual, and the Attorney-General is neither a necessary nor a proper party to such a proceeding—*Buddhadasa* v. *Nadaraja*[13]; *Hutton* v. *Secretary of State for War*[14]; *Roper* v. *Public Works Commissioners*,[15] and *MacKenzie-Kennedy* v. *Air Council*.[16] Two declaratory action cases are *China Mutual Steam Navigation Co.* v. *MacLay*[17] and *Bombay and Persia Steam Navigation Co.* v. *MacLay*.[18]

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[10] (1913) 16 N.L.R. 161, 168, 169, 171, 180.

[11] [1898] 1 Ch. 73, 77; 14 T.L.R. 36.

[12] [1901] A.C. 561, 575, 580; 17 T.L.R. 496, P.C.

The Land Commissioner is not in fact a corporation for any purposes whatsoever. He is certainly not expressly created a corporation by the legislature, nor, indeed, has he even been expressly given the right to sue and be liable to be sued. None of the tests which have been applied in the English courts is to be found in this case, and admittedly English law applies on this matter. The most significant of the tests would be the necessity to treat a person as a corporation because there is provision for property to be vested; and in some cases the right to make contracts which would be binding on his successors. Another test is perpetual succession; there must also be a corporate name: *MacKenzie-Kennedy* v. *Air Council*[19]; *Conservators of the River Tone* v. *Ash*.[20] On an examination of the Ordinance it is difficult to see that the Land Commissioner had anything to do beyond making decisions on behalf of the Government. He is not vested with any property at all. Long before the making of a Land Commissioner the Public Trustee was expressly incorporated: Public Trustee Ordinance, Legislative Enactments, 1938, c. 73. Even if the Land Commissioner had been created a corporation for certain purposes it is necessary that he should also have been held to be incorporated for the particular purpose which is relevant to the action: *Gilleghan* v. *Minister of Health*[21]; see also Halsbury's Laws of England, 3rd. ed., vol. 9, p. 28, para. 45.

Whether or not the Land Commissioner was incorporated, the fact that the Land Acquisition Act, 1950, provided the machinery for implementing decisions for the acquisition of land under the Land Redemption Act makes it clear that, after that date, the remedy of injunction became quite inappropriate: see sections 60,

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[13] (1955) 56 N.L.R. 537, 543, 545.

[14] (1926) 43 T.L.R. 106.

[15] [1915] 1 K.B. 45, 52.

[16] [1927] 2 K.B. 517, 521, 531; 43 T.L.R. 733, C.A.

[17] [1918] 1 K.B. 33, 36, 41; 34 T.L.R. 81.

[18] [1920] 3 K.B. 402.

[19] [1927] 2 K.B. 517, 533–534.

[20] (1829) 10 B. & C. 349, 385.

[21] [1932] 1 Ch. 86, 92–93; 47 T.L.R. 439.

62, 63 of, and the Schedule to, the Act of 1950. Here, when the Supreme Court granted the injunction, it was quite inappropriate because there was nothing more which the Land Commissioner could do; it is self-evident that if an injunction is to issue there must remain something to be done in respect of which the individual must be restrained: *Estate and Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust.*[22] If the submission that the Land Commissioner is not in fact a corporation is accepted, the proper proceeding should have been against the particular officer by name, whether or not he was described by reference to his office. It is not sought, however, to rely on that as a fatal irregularity in this case. It is enough to treat the action as if it were one in which he is sued in his representative capacity—that he is so sued is quite clear from the language of the plaint—and the remedy by injunction does not lie against a public officer in a representative capacity: *Attorney-General* v. *Birmingham Corporation.*[23]

Summarising: (1) On the merits, on a fair construction of the provisions of the Land Redemption Ordinance, the provisions of section 3 (1) (*b*) were not inapplicable. Alternatively, at the time of the trial section 3 (1) (*c*) had been introduced, and injunction in the widest possible terms was asked for and could not, therefore, have been granted without a finding that the provisions of (*c*) were also inapplicable. (2) The Land Commissioner is not a corporation for the purposes of his functions under the Land Redemption Ordinance. Whether he was incorporated or not he could not be sued in a representative capacity for an injunction in respect of a threatened tort. (3) Finally, if the Land Commissioner for the time being had been sued as an individual an injunction should have been refused for two reasons: (i) Mr. Amarasinghe (the Land Commissioner when the action was instituted) had personally ceased to be the Land Commissioner, and (ii) in any case after March, 1950, the Land Commissioner was powerless to implement any earlier decision to acquire.

Sir Frank Soskice Q.C. and *Joseph Dean* for the first respondent. At the date of the Land Commissioner's determination, May 12, 1947, the law of Ceylon on the matter was contained in, and only in, section 3 (1) (*b*) of the Ordinance of 1942. If there had been another determination after the amending Ordinance of 1947 came into effect, other considerations might have arisen, but there never was a second determination, and the submission is that the determination was invalid because, in the circumstances of this case, it was not authorised by section 3 (1) (*b*) of the Ordinance of 1942. In so far as there is any doubt about the language of the Ordinance, the view should be taken which prevents an intrusion on the rights of the subject any greater than that which is expressly conferred. The legislature is contemplating the simple mortgage of land, and section 3 (1) (*b*) only applies where *the* land subject to the mortgage is transferred in order to extinguish the debt. "Part" in section 3 (1) means some ascertained portion of the land—say, 10 or 20 acres. As at May 12, 1947, the Land Commissioner has to be able to say that he was satisfied that the 10 or 20 acres was transferred by the owner of that land to a third person in satisfaction of a debt due from the owner to such third person, and which debt prior to the transfer was secured by a mortgage on the 10 or 20 acres. The land here was transferred by Elaris not to any other person in satisfaction of a debt due from Elaris to the other person; it was transferred by him to two persons, one Sockalingam, to whom admittedly a debt was due, and to Sekappa, to whom, ex concessis, no debt was due. In those circumstances section 3 (1) (*b*) is not satisfied, and that is sufficient to determine this appeal against the appellant. By adopting the argument for the appellant one would be reading into the section words which are just not there, and which should not be implied in the circumstances of this case.

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[22] [1937] A.C. 898, 917; 53 T.L.R. 829; [1937] 3 All E.R. 324, P.C.

[23] (1880) 15 Ch.D. 423, C.A.

The second submission is that a transfer of an undivided interest is not the same as a transfer of land. Assuming against the respondent that the debt was due to both Sockalingam and Sekappa, the submission is that the transfer of a two-thirds undivided interest to Sockalingam and of a one-third undivided interest to Sekappa in 20 acres is not a transfer of the land. Add them both together, it still is not a transfer of the land—there are two separate transfers of undivided interests in the 20 acres. "Land" in this context does not include an interest in land consisting of an undivided interest. Lee's Introduction to Roman-Dutch Law, 5th ed., p. 155, describes a form of ownership by more than one person.

The third submission is that this is not a transfer in satisfaction of a debt at all—it is an ordinary sale for Rs. 75,000. Further, the transfer which falls within, and is contemplated by, section 3 (1) (*b*) is not the same as that which took place here.

The payment of Rs. 75,000 having been made, there was apparently some independent arrangement whereby the Rs. 75,000 was by mutual agreement to be treated as set off against the debts due on P.1 and the mortgage decree. The point is technical, but one of law, and since the Ordinance has to be construed strictly, it should succeed. The transaction was not within the scope of section 3 (1) (*b*)—it is not described in the language of the subsection. The question as to the nature of the transaction here was not considered in *Perera* v. *Unantenna* [24] which, by implication, must be treated as deciding it against the respondent.

The next point is that the true nature of the transfer was that the consideration moving from Elaris to the creditors was not simply the land but the land plus his own undertaking to satisfy the tertiary mortgage. Thus the consideration moving from him in return for the Rs. 75,000 or in return for the extinguishment of the two debts was two-fold, (a) the land, and (b) his undertaking to discharge the tertiary mortgage. Section 3 (1) (*b*) requires a transfer of land in part satisfaction of a debt; this was not such a transfer, it was a transfer of two things, land plus the undertaking.

Next, where a mortgage decree has been entered the debt created by and due on the mortgage disappears, and the only debt is that created by the mortgage judgment. So far as the mortgage is concerned, undoubtedly it continues to exist for some, but not for all, purposes; it does not continue to be a charge to secure the judgment debt; the judgment debt is secured solely by the decree itself. Once one has got the judgment, ipso facto the debt disappears: *Ex parte Fewings, In re Sneyd* [25]; *In re European Central Railway Co., Ex parte Oriental Finance Corporation.*[26] Those two cases show that the effect of the judgment is to extinguish the debt. As against that, it was said by Bankes L.J. in *Aman* v. *Southern Railway Co.*[27] that "such a judgment merely "operates as an additional security for the due payment of the "debt." And in *Perera* v. *Unantenna* [28] Rose C.J. said that the charge still exists. It cannot exist, however, because the debt which it secures has itself ex hypothesi gone—one cannot have a charge to secure a debt which is not in existence. A new security is established by the judgment. Section 11 of the Mortgage Ordinance (c. 74 of the 1938 Legislative Enactments) shows that for certain purposes the mortgage is to be kept on foot.

[24] 54 N.L.R. 457.

[25] (1883) 25 Ch.D. 338, C.A.

[26] (1876) 4 Ch.D. 33, C.A.

[27] [1926] 1 K.B. 59, 71; 42 T.L.R. 31, C.A.

[28] 54 N.L.R. 457.

It is submitted next that the Chief Justice in the present case was perfectly right in saying that section 3 (1) has no application in a case where, as here, the land transferred is only part of the land which is secured by the mortgage.

With regard to the procedural points, the first submission is that section 3 (1) (*c*) has no application here because of the proviso to the section. It can only have application in spite of the proviso where there has been a partition decree. Here there was a transfer of two undivided shares, and the subsection "shall "not apply to such undivided shares." Secondly, as to the remedy; it does not matter to the respondent whether he gets a declaration or an injunction, provided that he gets one or the other. Thirdly, as to the parties; the respondent has sued the Land Commissioner, and has done exactly what the relevant sections of the Ceylon Civil Procedure Code (c. 86) tell him to do; it is not disputed that he has given a notice under section 461. His action would therefore seem, so far as it is against the Land Commissioner, one which comes within the formula: "an action "against a public officer in respect of an act purported to be done "by him in his official capacity." One can either sue a living persona or a persona who is the creation of the law. Here Mr. Amarasinghe was sued, and the submission may be put in alternative ways: either (1) the respondent has sued within the meaning of section 461 a public officer in respect of an act purporting to be done by him in his official capacity, or (2), as held by the trial judge and the two majority judges in the Supreme Court, the Land Commissioner as constituted by the Land Development Ordinance for the purposes not only of that Ordinance but also of the Land Redemption Ordinance is a corporation capable of suing and being sued. An injunction against Mr. Amarasinghe personally, although he no longer holds the office, is the proper remedy, but if it is not, there should be a declaration against him—a declaration that the determination made by the Land Commissioner on May 12, 1947, to acquire the estate pursuant to section 3 (1) (*b*) of the Land Redemption Ordinance, 1942, is ultra vires and void.

It was argued for the appellant that the respondent cannot have a declaration against Mr. Amarasinghe because the Attorney-General was not joined in the action, and that under the law of Ceylon one cannot get such a declaratory decree against the Attorney-General, but see *Buddhadasa* v. *Nadaraja*,[29] *Sanford*

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[29] 56 N.L.R. 537, 543.

v. *Waring*,[30] *Le Mesurier* v. *Layard* (*Attorney-General of Ceylon*)[31] and the *Colombo Electric Tramway* case.[32] None of these cases shows that there is any legal obstacle to asking for a declaration against an individual in a proper case. The courts in England have expressed the view that the remedy by declaration is a useful jurisdiction which should be generously and readily exercised. Declarations have been granted against statutory corporations: *Hanson* v. *Radcliffe Urban District Council.*[33]

The submission on the second limb of the procedural question is that one should regard this Land Commissioner as a corporation, a fictitious persona. Each of the functions conferred on him by the Ordinance must be regarded as falling within the tests referred to in the authorities. The legislature regards itself as having brought into being a continuing artificial persona.

The respondent should succeed on the merits and on one or other of the two ways on the procedure point. [Reference was made to *West Suffolk County Council* v. *W. Rought Ltd.*[34]]

Dean following. Even assuming that the Land Commissioner is not a corporation, nevertheless he could be sued nomine officii; he is therefore responsible for the decisions of his predecessors. The same kind of continuity would apply as in the case of partners in a firm—the firm would still be the same firm and could be sued in the firm name, and the Land Commissioner is still the same office and can be sued in that name. Public officers can be and are sued in Ceylon nomine officii. The commissioner established by section 18 of the Indian and Pakistani Residents (Citizenship) Act, 1949, is not in a dissimilar position from that of the Land Commissioner, and proceedings were brought against him nomine officii without any objection: *Duraisamy* v. *Commissioner for Registration of Indian and Pakistani Residents*[35]; *Paramasivam* v. *Commissioner for Registration of Indian and Pakistani Residents.*[36] Since an order for certiorari can be made against the Land Commissioner, then equally he can be sued as Land Commissioner nomine officii: *Leo* v. *Land Commissioner.*[37] In *Samarasekera* v. *Secretary, D.C., Matara*,[38] it was held that the successor to the Land Commissioner continued just as before.

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[30] (1896) 2 N.L.R. 361.

[31] (1898) 3 N.L.R. 227; (1901) 5 N.L.R. 65, 72, 74.

[32] 16 N.L.R. 161, 171.

[33] [1922] 2 Ch. 490, 508; 38 T.L.R. 295, 667, C.A.

[34] [1957] A.C. 403; [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216.

[35] (1955) 56 N.L.R. 313.

[36] Ibid. 514.

[37] (1955) 57 N.L.R. 178.

[38] (1949) 51 N.L.R. 90.

Each co-owner has a separate interest in the land—the position is analogous to tenants in common in England. The Ordinance does not apply to undivided shares; what happened here was a transfer of undivided shares and was outside the provisions of the Ordinance.

Gratiaen in reply. The apparent conflict between the operative words of the conveyance (P.5) and the language of the attestation clause does not justify a decision as a pure matter of law that the language of the conveyance precluded the Land Commissioner from deciding that there was a transfer in satisfaction of the debts within the meaning of either section 3 (1) (*b*) or (*c*). [*Sah Lal Chand* v. *Indrajit*[39] was referred to.] The court is entitled to look to the substance of the transaction to see what the position was: Wille on Mortgage in South Africa, 1st ed., p. 75. It is always a question of fact whether the consideration was in satisfaction of a debt.

There is nothing in any part of section 3 to take out of the operation of the scheme of the legislation a transfer of the whole land to be held in common.

The injunction in the form granted by the Supreme Court is in such wide and comprehensive terms that it must be set aside unless the land is completely immune from (*c*) as well. A declaratory decree should not be granted by the Board because it affects rights and obligations of people who have not been heard in the matter. Having failed against Mr. Amarasinghe in his representative capacity, the respondent is now asking that the whole scope of the action should be changed to a declaratory action against an individual. If a declaratory decree is sought in order to challenge a threatened acquisition for the benefit of the Crown, the Attorney-General is a necessary party to the action: *London Passenger Transport Board* v. *Moscrop*[40]; *Maerkle* v. *British Continental Fur Co. Ltd.*[41]; *Dyson* v. *Attorney-General.*[42]

With regard to Mr. Dean's argument that somebody who is not a corporation can be sued nomine officii, there is no statute which says that the action must be against the Land Commissioner if he is sued nomine officii without being a corporation.

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[39] (1900) 4 Cal.W.N. 485.

[40] [1942] A.C. 332, 345; 58 T.L.R. 120; [1942] 1 All E.R. 97, H.L.

[41] [1954] 1 W.L.R. 1242, 1248; [1954] 3 All E.R. 50, C.A.

[42] [1911] 1 K.B. 410, 421; 27 T.L.R. 143, C.A.

There is no half-way house between a corporation and an individual person. [Reference was made to *Neale* v. *Ratwatte*.[43]] No statutory requirement, except where there is express or clearly implied provision to that effect, would result in a decree against a public officer being binding on anybody but himself. In *Samarasekera's* case [44] the secretary of the court was not a corporation sole for all purposes, but only for limited purposes. There appears to be no case where the Land Commissioner has been sued nomine officii with the intention of binding the Government, and there is no statutory provision for it. [Reference was also made to *Silva* v. *Attorney-General*.[45]]

The second respondent did not appear and was not represented.

July 27. The judgment of their Lordships was delivered by Lord Morris of Borth-y-Gest, who stated the facts set out above and continued: The decree of the Supreme Court in the form as set out must have been entered per incuriam for the determination of the Land Commissioner was limited to the estate whereas the injunction would cover other lands as well as the estate. But, quite apart from this, there are substantial reasons which lead their Lordships to the conclusion that the judgment cannot stand. In the first place, under the judgment an injunction is issued against the Attorney-General whereas in the District Court it had been conceded that the action as against the Attorney-General should be dismissed. In the second place, the injunction as framed and as claimed in the plaint in the action would restrain the taking of any step under Ordinance 61 of 1942 to acquire the estate (leaving aside the question concerning the other lands referred to above). But the only determination that was made by the Land Commissioner was that which was made under section 3 (1) (*b*) on May 12, 1947, and after that date Ordinance 61 of 1942 was amended. As stated above, it was amended by Ordinance 62 of 1947. As a result Ordinance 61 of 1942 now includes paragraph (*c*) of subsection (1) of section 3. The injunction as framed would prevent the Land Commissioner from making a new determination and from endeavouring to justify it as being warranted by the provisions of Ordinance 61 of 1942 in the form in which it stood after July 3, 1947.

These objections to the decree of the court leave untouched the questions as to the effect of bringing proceedings against the

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[43] (1919) 6 Cey.W.Rptr. 265.

[44] 51 N.L.R. 90, 91–92.

[45] (1951) 52 N.L.R. 481.

Land Commissioner. There is the further question that the injunction would appear to ignore the changes in regard to acquiring land which were effected by the Land Acquisition Act, No. 9 of 1950.

For the reasons given their Lordships consider that the order made by the decree of the Supreme Court cannot be supported, and that the objections to the order presented on behalf of the Land Commissioner must prevail. It may here be stated that Elaris did not appear and was not represented before their Lordships' Board.

In argument before the Board Sir Frank Soskice, on behalf of the substituted plaintiff, while not abandoning a claim to the issue of an injunction, stated that his client would be content if a declaration were made to the effect that "the determination "made by the Land Commissioner on May 12, 1947, to acquire "the Keeriyankalliya Estate pursuant to section 3 (1) (*b*) of the "Land Redemption Ordinance, No. 61 of 1942, was ultra vires "and void."

Important questions are raised (a) as to whether on May 12, 1947, the circumstances were covered by and were within the wording of section 3 (1) (*b*) of the Land Redemption Ordinance, and (b) as to the appropriate procedure for seeking determination of the issues raised by the plaintiff and the substituted plaintiff.

Under the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance the Land Commissioner was authorised to acquire the estate on behalf of the Government if satisfied that the estate was part of agricultural land which was transferred by its owner "to any other person in satisfaction or part satisfaction of a debt "which was due from the owner to such other person and which "was immediately prior to such transfer secured by a mortgage "of the land." The estate was owned by Elaris. It was transferred together with certain other lands to Sockalingam and Sekappa. The words in the Ordinance "to any other person" must, their Lordships conclude, be interpreted as including any other person or persons. If, then, the land, including the estate, which was transferred by P.5 was transferred to Sockalingam and Sekappa, was such transfer in satisfaction or part satisfaction of a debt which was due from Elaris to Sockalingam and Sekappa?

It was contended that the "land" was not transferred within the meaning of section 3 (1) (*b*) of the Land Redemption Ordinance in that only undivided shares in the land were transferred to different persons. Their Lordships cannot accept this contention. The "land" was transferred by Elaris. The circumstance that as between the two transferees one took an undivided two-thirds share and the other an undivided one-third share does not alter the fact that the land (which included the estate) was transferred by Elaris.

Was such transfer in satisfaction or part satisfaction of a debt? It was contended that it was not, inasmuch as the deed of transfer (P.5) of May 4, 1935, recited that the transfer which was of the estate together with certain other lands was in consideration of the sum of Rs. 75,000 " well and truly paid " by Sockalingam and Sekappa. It was submitted, therefore, that the real nature of the transaction was that it was an out and out sale of land for a consideration of Rs. 75,000. The actual wording in the deed was: " in consideration of the sum of Rupees Seventy-five thousand " (Rs. 75,000) of lawful money of Ceylon well and truly paid to " me by the said vendee (the receipt whereof I do hereby admit " and acknowledge). . . . " It was earlier recited that the vendor had agreed with Sockalingam and Sekappa, " herein- " after sometimes called or referred to as the vendee." But in the attestation clause signed by the Notary Public it was certified " that the full consideration above-named was set off in full satis- " faction of the claim and costs due in Case No. 7365 D.C. " Negombo and the principal and interest due on Mortgage Bond " No. 391 dated 30th September, 1925, attested by T. A. " Fernando, Notary Public, and that the said vendor undertook " to release the lands appearing in this Deed from tertiary mort- " gage bond bearing No. 2339 dated 8th March, 1931. . . ."

It is provided by the Notaries Ordinance (1907, Volume 3, Legislative Enactments of Ceylon, Cap. 91) that a notary in attesting any deed or instrument executed or acknowledged before him must state whether any money was paid or not in his presence as the consideration or part of the consideration of the deed or instrument and, if paid, the actual amount in local currency of such payment (see section 30 (20)).

The terms of the attestation clause point to the conclusion that no money was paid by Sockalingam and Sekappa in the presence of the Notary Public, and it seems clear that instead of there being any payment of Rs. 75,000, that amount was set off in full satisfaction of the claim and costs due in case No. 7365 and the principal and interest due on mortgage bond No. 391 (P.1.). In considering the word " debt " as used in section 3 (1) (*b*) their Lordships see no reason to exclude a debt due under a mortgage decree founded upon a mortgage bond. The various lands (one part of which was the estate) were, however, transferred by Elaris to Sockalingam and Sekappa in satisfaction of debts due from Elaris to Sockalingam. The claim in case No. 7365 was a claim by Sockalingam alone. The principal and interest due on mortgage bond No. 391 was due to Sockalingam and others. Sekappa was not a party to such mortgage bond. Their Lordships cannot therefore resist the conclusion that though the land covered by the transfer P.5 was transferred by Elaris to Sockalingam and Sekappa it was not transferred in satisfaction of a debt or debts due to Sockalingam and Sekappa. On this ground their Lordships consider that the determination made by the Land Commissioner on May 12, 1947, was not warranted by the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance.

It was submitted by Mr. Gratiaen that if the lands transferred by Elaris had been transferred to Sockalingam alone the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance would have been applicable, and he submitted that inasmuch as the transfer to Sockalingam and Sekappa was in satisfaction of two secured debts (the debt secured by the mortgage bond P.1 and the debt created by the mortgage decree P.4) which Sockalingam could release alone, the transfer had the same legal effect as a transfer to Sockalingam alone. Mr. Gratiaen submitted that after a transfer to Sockalingam he (Sockalingam) could have transferred the land or an interest in it to someone else, and that if at Sockalingam's wish the transfer by Elaris was in the first instance to Sockalingam and to someone else, then the transfer should not be regarded as being outside the provisions of section 3 (1) (*b*). This submission involves substituting for the words "transferred . . . to any other person" the words "transferred ". . . to or to the order of any other person." On the facts of the present case the land was transferred to two persons in satisfaction of debts due to only one of them. Their Lordships are mindful of the fact that resort to the provisions of the Land Redemption Ordinance may lead to the expropriation of land (albeit on the payment of compensation) and they consider that the wording of the Ordinance must be shown to be strictly applicable before a "determination" can validly be made.

The circumstance that when by the deed of transfer of May 4, 1935 (P.5), Elaris transferred the estate and other lands to Sockalingam and Sekappa he (Elaris) undertook to release the lands appearing in the deed from the tertiary mortgage bond (as the attestation clause shows) does not alter the conclusion that the lands were transferred to Sockalingam and Sekappa in satisfaction of the debts due from Elaris to Sockalingam.

Reference must be made to certain other submissions which were advanced in support of the contention that the Land Commissioner was not warranted in making his determination of May 12, 1947. It was said that the debt due from Elaris under mortgage bond No. 533 (P.2) became merged in the judgment in case No. 7365 in the District Court of Negombo, and that the transfer by Elaris was, as a result, not in satisfaction or part satisfaction of a debt "which was immediately prior to such "transfer secured by a mortgage of the land." It was said that though after the judgment the mortgage continued to exist for some purposes yet it did not secure the judgment debt. Their Lordships have concluded that the lands transferred by Elaris (which lands included the estate) were transferred in satisfaction of the debt secured by the mortgage bond of September 30, 1925 (P.1), and of the claim and costs due in case No. 7365. But their Lordships see no reason to differ from the conclusion in *Perera* v. *Unantenna.*[1] In that case it was held that where a land is mortgaged and the mortgage is put in suit and decree is entered against the mortgagor for the payment of the amount due on the mortgaged bond, a subsequent voluntary conveyance by the mortgagor in favour of the mortgagee, the consideration for which is set off in full settlement of the amount due on the decree, is a transfer as contemplated in section 3 (1) (*b*).

It was further said that inasmuch as some only of the lands which were mortgaged were transferred by the deed of transfer of May 4, 1935 (P.5), the provisions of section 3 (1) (*b*) were for that reason inapplicable. It was said that those provisions were designed to cover ordinary cases where an owner of a piece of land borrows money on the security of a mortgage of such piece of land and then transfers it to the lender in satisfaction of the loan. Their Lordships see no reason to define or to limit the circumstances under which the provisions of section 3 (1) (*b*) become applicable, or to seek to apply any other test than that which is directed by the language of the section. Nor can their Lordships accede to the submission that section 3 (1) (*b*) cannot apply to a case where the lands transferred are some only of the lands secured by mortgage.

The Land Commissioner is authorised to acquire "the whole

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[1] (1953) 54 N.L.R. 457.

"or any part" of agricultural land which was transferred in the manner described in (*b*). The estate was a part of the land transferred. The land was transferred by its owner Elaris. It was transferred to Sockalingam and Sekappa. Was it transferred to them in satisfaction or in part satisfaction of a debt (or debts) due from Elaris to them being a debt (or debts) secured (immediately prior to the transfer) by a mortgage of the land? For the reason already stated their Lordships consider that this question must be answered in the negative, and that the determination of the Land Commissioner was not warranted by the provisions of the section.

It cannot be said that the transfer of the land was to Sockalingam alone inasmuch as the deed of transfer expressly states that it was to both Sockalingam and Sekappa.

Their Lordships need only briefly advert to a point that was originally pleaded in the action but which was not taken before their Lordship's Board. It was pleaded that the determination of the Land Commissioner to acquire the estate under the provisions of the Ordinance was final and conclusive, and could not be questioned in the proceedings, and that the court had no jurisdiction to entertain the action. Such pleading was doubtless framed with the provisions of subsection (4) of section 3 in mind. Their Lordships consider that any question of finality in the Land Commissioner's determination can only arise in regard to his exercise of individual judgment as to whether he should or should not acquire any land which he "is authorised to acquire under "subsection (1)." His personal judgment can only be brought to bear upon the question as to whether or not he should acquire land that is covered by the wording of subsection (1). The antecedent question as to whether any particular land is land which the Land Comnissioner is authorised to acquire under the provisions of subsection (1) is not one for his final decision but is one which, if necessary, must be decided by the courts of law.

These being their Lordships' conclusions upon the substantive as opposed to the procedural issues which present themselves in this appeal, the question arises as to what course should be followed. After the death of Ladamuttu the substituted plaintiff decided to continue the action and to proceed to claim relief in the form in which it had originally been sought. The first prayer was for an injunction restraining the defendants jointly or in the alternative from taking steps under Ordinance No. 61 of 1942 to acquire lands described in the schedule to the plaint. As already pointed out, the determination had been under the provisions of section 3 (1) (*b*) but by the date of the plaint Ordinance No. 61

of 1942 had been amended to include section 3 (1) (*c*). An injunction in the terms asked for would therefore have precluded the making of a new determination under the terms of section 3 (1) (*c*) if such a new determination were thought to be competent. Furthermore, before the action came to trial and before the action was continued by the substituted plaintiff the law as to the procedure to be followed in the acquisition of land (after a determination by the Land Commissioner) had been changed. By the time that the action came to trial the holder of the office of Land Commissioner was not the same person as the holder at earlier relevant dates. At the trial of the action important procedural issues were debated but then the Attorney-General was by consent dismissed from the action. Thereafter, on appeal, the substituted plaintiff obtained the judgment in his favour which directed that an injunction (in the terms originally asked for) should be issued restraining the defendants jointly or in the alternative. In view of all the circumstances and of the course that this litigation has taken, and of the fact that the Attorney-General was a party but no longer is, their Lordships cannot think that at this stage of the litigation it would be appropriate to accede to an application that some form of declaration should be made.

It is to be remembered that the plaint was in July, 1949. The action was brought following upon a notification to the plaintiff by the Land Commissioner on or about February 7, 1949. The determination of the Land Commissioner had been in May, 1947. The Chief Justice records in his judgment that the Land Commissioner at the time of the determination was Mr. (later Sir Arthur) Ranasinha. When the action was instituted the Land Commissioner was Mr. Amarasinghe. Even the successor of the latter was no longer in office at the time when the case was under appeal in the Supreme Court.

It is provided by section 463 of the Civil Procedure Code that if the Government undertake the defence of an action against a public officer the Attorney-General shall apply to the court, and that upon such application the court shall substitute the name of the Attorney-General as a party defendant in the action. It is provided by section 464 that if such application is not made by the Attorney-General on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed (subject to certain exceptions) as in an action between private parties. But in the present litigation the Attorney-General was made a defendant and was then with the concurrence of the substituted plaintiff dismissed from the proceedings.

Their Lordships do not think that without hearing the Attorney-General it would be appropriate to pass opinion upon all the procedural issues which were discussed by the Chief Justice in his judgment, though some of these call for consideration. While their Lordships must reserve their opinion upon the question (which, in view of the conclusions reached by their Lordships, does not immediately arise) as to whether in circumstances such as those in the present case any injunction against the Attorney-General could or ought to be granted, their Lordships consider that if the authority of a Land Commissioner to make a determination under section 3 of the Land Redemption Ordinance is challenged the appropriate procedure is by way of an application for certiorari (see *Leo* v. *Land Commissioner*[2]). The Land Commissioner as the judicial tribunal the validity of whose action is being tested may then conveniently be brought before the higher court so that, if necessary, his decision or order may be brought up and quashed. If in some particular case it can be shown that a determination has not been within the competence of a Land Commissioner, and if an application is made which results in an order to bring up and quash his determination, then the difficulties which the present proceedings bring into relief are avoided. It was Mr. Amarasinghe who was the Land Commissioner in July, 1949, when these proceedings began, and whose proxy was filed and on whose behalf an answer was presented. If a declaration were now to be made—who would be bound? If an injunction were to be granted—who would be enjoined? It was sought to be said that the Land Commissioner is a corporation sole. Their Lordships do not find support for this view in the provisions of the Land Development Ordinance of 1935. In the interpretation section (section 2) it is laid down that " Land Commissioner " means " the officer appointed by the Governor under section 3 " of this Ordinance and includes any officer of this Department " authorised by him in writing in respect of any particular matter " or provision of this Ordinance." The Land Commissioner is not expressly created a corporation sole by any legislative enactment, nor is it laid down that he may sue or be sued in a corporate name. Furthermore, no legislative enactment seems to reveal any intention to incorporate. If, following upon a determination by the Land Commissioner (which if made within his powers is made "in the exercise of his individual judgment") land is acquired, such land does not vest in the Land Commissioner. If there had been a desire to incorporate the Land Commissioner there could have been express words of incorporation. Thus, in the case of the Public Trustee it is enacted by section 3 of the Public Trustee Ordinance of 1930 as follows: "The Public Trustee shall be a corporation sole under that name "with perpetual succession and an official seal and may sue and "be sued under the above name like any other corporation sole."

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[2] (1955) 57 N.L.R. 178.

All these considerations, including the absence of any evident intent to incorporate, lead their Lordships to reject the submission that the Land Commissioner can be regarded as a corporation sole. (Compare *MacKenzie-Kennedy* v. *Air Council.*[3])

In view of the decisions which their Lordships have reached and expressed in regard to the relief which was sought in the District Court and in the Supreme Court, and which after the changes made in 1950 was the relief which the substituted plaintiff persisted in claiming, and in view of the absence of the Attorney-General as a party to the proceedings subsequent to those in the District Court, their Lordships must refrain from pronouncing upon other procedural questions which are discussed in the judgment of the Chief Justice. Although their Lordships are of the opinion that the Land Commissioner was not entitled to make the determination that he did under section 3 (1) (*b*) of the Ordinance of 1942, their Lordships consider, for the reasons stated above, (1) that the order of the Supreme Court cannot stand, and (2) that it would not be appropriate at this stage of the litigation to accede to the application that some form of declaration should be made.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed, and that the order and judgment of the Supreme Court be set aside, and that the action should be dismissed with costs. The first respondent must pay the costs of the hearing before their Lordships' Board and in the Supreme Court.

Solicitors: *T. L. Wilson & Co.; Graham Page & Co.*

C. C.

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[3] [1927] 2 K.B. 517; 43 T.L.R. 733, C.A.

J. C.*

1960
July 27.

LAND COMMISSIONER . . . . . . APPELLANT;

AND

VASARA PINTO JAYEWARDENE AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Land—Compulsory purchase—Agricultural land—Mortgage—Some only of mortgaged lands transferred in satisfaction of debt—Ordinance applicable—Decree prior to transfer—Debt remaining secured by mortgage—Land Redemption Ordinance, No. 61 *of* 1942 (*as amended by Ordinance No.* 62 *of* 1947), *s.* 3 (1) (*b*).

Ceylon — Land — Redemption — Agricultural land — Land Redemption Ordinance, No. 61 *of* 1942 (*as amended by No.* 62 *of* 1947), *s.* 3 (1) (*b*).

Section 3 (1) (*b*) of the Land Redemption Ordinance, 1942, of Ceylon, as amended, is applicable where some only, and not necessarily *all*, of several agricultural lands which have been mortgaged are transferred to the mortgagee in satisfaction or part satisfaction of the debt.

Where, prior to the transfer, the mortgagee has put the mortgage bond in suit and obtained a decree, the debt remains secured by the mortgage of the land and not by the decree.

Perera v. *Unantenna* (1953) 54 N.L.R. 457 approved.

Judgment and order of the Supreme Court of Ceylon reversed.

APPEAL (No. 26 of 1959) against a judgment and order of the Supreme Court of Ceylon (Basnayake C.J. and Pulle J., K. D. de Silva J. dissenting) (February 7, 1958) affirming a judgment and decree of the District Court of Colombo (November 6, 1953), which had directed that an injunction should issue in favour of the plaintiff in the action restraining the Land Commissioner from acquiring certain lands under the Land Redemption Ordinance, 1942. The principal issue raised in the appeal was one of the construction of the Ordinance.

The following facts are taken from the judgment of the Judicial Committee: The facts which gave rise to the proceedings are not in controversy. One Suriyapperuma owned certain lands which by bond No. 1987, dated January 30, 1932, he mortgaged to one Cyril Pinto Jayewardene as security for the

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* *Present*: LORD TUCKER, LORD KEITH OF AVONHOLM, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, the RT. HON. L. M. D. DE SILVA.

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repayment of a sum of Rs. 5,500 which had been lent to Suriyapperuma. Jayewardene put the mortgage bond in suit and obtained a mortgage decree dated July 18, 1934. Thereafter by deed dated July 20, 1935, Suriyapperuma conveyed to Jayewardene some but not all of the lands which had been mortgaged. The conveyance was in satisfaction of the amount due on the mortgage decree. Possession of the lands conveyed was taken. Jayewardene died in August, 1937, and his widow and child, who were the plaintiffs in the action which was later brought, acquired title to the lands conveyed as heirs of Jayewardene. At a much later date (December 31, 1950) the Land Commissioner made a determination to acquire two lands being part of the lands conveyed by the deed of July 20, 1935. The determination was made under section 3 (1) (*b*) of the Land Redemption Ordinance. Notice was given by the Land Commissioner to the two plaintiffs, who in 1952 commenced proceedings against the Land Commissioner. By their plaint, dated March 24, 1952, they stated that the two lands did not fall "within the description in section 3 "of the Land Redemption Ordinance No. 61 of 1942," and that they were not therefore subject to acquisition by the Land Commissioner under the Ordinance. The plaintiffs claimed an injunction restraining the Land Commissioner "from the acquisition "of" the two lands. In the answer of the Land Commissioner it was pleaded that his determination was final and could not be canvassed in a court of law, and it was further pleaded that the action was wrongly constituted against the Land Commissioner inasmuch as any steps for the acquisition of the lands would be taken by the Minister and not by the Land Commissioner.

As mentioned above, the claim succeeded, and it was directed that an injunction should issue. At the trial of the action issues were framed and were answered as follows:

Issue	*Answer*
"1. Are the lands in question capable of being "acquired under section 3 of the Land Redemption "Ordinance? (It is admitted that the Land Commis- "sioner made a determination under section 3, sub- "section (4) of the Land Redemption Ordinance.)	No
"2. Even if issue 1 is answered in favour of the "plaintiff is the plaintiff entitled to an injunction "restraining the Land Commissioner from taking steps "to acquire them?	Yes

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Issue	Answer
"3. Is the action properly constituted as against "the Land Commissioner?	Yes
"4. Is the Land Commissioner's determination "final and conclusive?	No
"5. If issue 4 is answered in the affirmative, can "the said determination be canvassed in a court of "law?"	Does not arise

In the Supreme Court the majority upheld the decision of the District Court. In regard to procedural issues and, in particular, to the question whether such an action as that which was brought could be maintained against the Land Commissioner nomine officii the majority made reference to the case then recently decided in the Supreme Court of *Ladamuttu Pillai* v. *Attorney-General.*[1] In regard to the construction of the Land Redemption Ordinance, Pulle J. expressed himself as follows: "If the learned judge's "interpretation of the section is that it is a condition precedent "to the exercise of the power of acquisition that all the lands "bound by the mortgage must be transferred, I am in agreement "with him." The judge rejected a submission that had been made that section 3 (1) (*b*) had no application because it could not be said that immediately prior to the transfer the debt created by the decree was secured by a mortgage. He added: "The correct"ness of the ruling in *M. S. Perera* v. *Unantenna*[2] was ques"tioned before us. I concurred in the judgment in that case "and, having reconsidered it, I see no reason for thinking that it "was wrongly decided." The Chief Justice summarised his conclusions as follows: "(*a*) Section 3 (1) (*b*) of the Land "Redemption Ordinance applies to a case of a transfer, in satis"faction or part satisfaction of the debt, of the entire land where "only one land is mortgaged and of all the lands where more "than one land is mortgaged. (*b*) The court has power to grant "an injunction against the Land Commissioner restraining him "from taking steps to acquire a land under the Land Redemption "Ordinance. (*c*) The Land Commissioner may be sued nomine "officii. (*d*) Section 3 (4) of the Land Redemption Ordinance "does not preclude a person from challenging in a regular action "the legality of the determination of the Land Commissioner to "acquire a land."

K. D. de Silva J. was of a different opinion, and in his judgment he said: "Without unduly straining the language of section

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[1] (1958) 59 N.L.R. 313.

[2] (1953) 54 N.L.R. 457.

"3 (1) (*b*), I do not think it can be said that the legislature "contemplated the application of this provision only to cases "where all the mortgaged lands have been transferred. The "object of this Ordinance was to render assistance to a class of "debtors who got into difficulties during an abnormal period of "financial stress. If the view put forward on behalf of the "respondents is to prevail that object would be defeated to a very "large extent. According to that view if a person borrowed a "sum of Rs. 50,000 by hypothecating ten lands—nine of which "were very valuable—as security for the loan and he later transferred to the mortgagee the nine valuable lands in satisfaction "of the debt he would not be entitled to obtain any relief through "the intervention of the Land Commissioner even though the "tenth land which he did not transfer was worth only Rs. 100. "It is difficult to believe that the legislature, in passing this "Ordinance, intended to countenance such a situation.

"In my view the lands in question come within the purview "of section 3 (1) (*b*) and the Land Commissioner was entitled to "acquire them. I would therefore allow the appeal and dismiss "the plaintiffs' action, with costs in both courts."

1960. May. 26. *E. F. N. Gratiaen* (*Q.C.* Ceylon) and *Walter Jayawardena* for the appellant. It was admitted that these two lands and some other mortgaged lands were transferred in full satisfaction of the debt, and that they were agricultural lands. The Land Commissioner is therefore clearly authorised by section 3 (1) (*b*) of the Land Redemption Ordinance to acquire the whole or any part of the mortgaged lands on behalf of the Government if he was satisfied that the land was at the relevant time transferred by the owner to another person in satisfaction or part satisfaction of a debt due from the owner to that person, and the debt was immediately prior to such transfer secured by a mortgage of the lands. K. D. de Silva J., the dissenting judge in the Supreme Court, quite correctly said in his judgment that under the section there is power to acquire one land out of many lands if that land was transferred in whole or part satisfaction of the debt. This part of the case is covered by the argument for the appellant in *Land Commissioner* v. *Pillai* [3]; the argument on whether the Land Commissioner is a corporation sole is also repeated. The appellant here had the power under the provisions of section 3 of the Ordinance to acquire the lands in question.

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[3] Ante, p. 854.

Sirimevan Amerasinghe for the respondents. This transaction was not one which came within section 3 (1) (*b*) of the Ordinance, because not all the mortgaged lands were transferred to the mortgagee in satisfaction of the debt. The section applies to a case of a transfer, in satisfaction or part satisfaction of the debt, of the entire land where only one land is mortgaged, and of *all* the lands where more than one land is mortgaged.

Also, immediately before the relevant transfer here, what secured the debt was not the mortgage of the land but the decree of the court: *Madar Lebbe* v. *Nagamma*[4]; *Ramanathan Chetty* v. *Cassim*[5]; the case of *Perera* v. *Unantenna*[6] is admittedly against this contention. The judgment of the majority of the Supreme Court is right.

A reply was not required.

July 27. The judgment of their Lordships was delivered by Lord Morris of Borth-y-Gest, who stated the facts set out above and continued: Their Lordships have had occasion in dealing with *Land Commissioner* v. *Ladamutta Pillai*[1] to consider the provisions of section 3 of the Land Redemption Ordinance.

Section 3 (1) of the Ordinance (No. 61 of 1942) as amended by Ordinance No. 62 of 1947 is in the following terms:

"3.—(1) The Land Commissioner is hereby authorised to "acquire on behalf of the Government the whole or any part of any "agricultural land, if the Land Commissioner is satisfied that that "land was, at any time before or after the date appointed under "section 1, but not earlier than the first day of January, 1929, "either—(*a*) sold in execution of a mortgage decree, whether or "not that land was subject to the mortgage enforced by that "decree, or (*b*) transferred by its owner or his executors or "administrators to any other person or the heirs, executors or "administrators of any other person in satisfaction or part satis"faction of a debt which was due from that owner or his "predecessor in title to that other person and which was secured "by a mortgage of that land subsisting immediately prior to the "transfer, or (*c*) transferred by its owner or his executors or "administrators to any other person, at the request of a mort"gagee of that land, in satisfaction or part satisfaction of a debt "which was due from that owner or his predecessor in title to "that mortgagee and which was secured by a mortgage of that "land subsisting immediately prior to the transfer.

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[4] (1902) 6 N.L.R. 21.
[5] (1911) 14 N.L.R. 177.
[6] (1953) 54 N.L.R. 457.
[1] Ante, p. 854.

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"The preceding provisions of this subsection shall not apply to "such undivided shares of an agricultural land as were sold or "transferred within the period specified in these provisions and in "the circumstances and manner set out in any of the preceding "clauses (*a*), (*b*) and (*c*), but, where those shares were converted "after the sale or transfer into any divided allotment or allotments by a partition decree of any court or by a duly executed "deed of partition, those provisions shall apply to such allotment "or allotments, and accordingly the word 'land' occurring in "this Ordinance shall be construed to include such undivided "shares which have been converted after sale or transfer as "aforesaid into any divided allotment or allotments."

The lands which were transferred to Jayewardene by the deed of July 20, 1935, were agricultural. The Land Commissioner made a determination to acquire two of the lands, i.e., a part of the land transferred. The lands were transferred by Suriyapperuma in satisfaction of a debt due from him to Jayewardene. The lands were secured by a mortgage which was subsisting immediately prior to the transfer. It would follow, therefore, that section 3 (1) (*b*) applied, and in their Lordships' view it matters not that there was additional land covered by the mortgage which was not included in the transfer. Their Lordships cannot agree with the view that section 3 (1) (*b*) only applies (where several lands are mortgaged) if all the mortgaged lands are transferred in satisfaction or part satisfaction of the debt.

Before their Lordships' Board it was contended that after a mortgage decree has been directed the debt is not secured by a mortgage of the land. It was said that thereafter it is the decree of the court that secures the debt. Their Lordships cannot accept this view, and they see no reason to differ from the conclusion reached in *Perera* v. *Unantenna*.[2]

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the action should be dismissed. The respondents must pay both the costs before their Lordships' Board and the costs in the District and Supreme Courts.

Solicitors: *T. L. Wilson & Co.; Darley, Cumberland & Co.*

C. C.

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[2] (1953) 54 N.L.R. 457.

J. C.*

1960
July 25.

ATTORNEY-GENERAL OF CEYLON . APPELLANT;

AND

R. B. HERATH AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Land — Compulsory purchase — Agricultural land — Mortgage—Land held by paraveni nilakaraya—Transferred in satisfaction of mortgage debt — Paraveni nilakaraya an "owner" — Acquisition valid—"Owner," meaning of—Ninda lord—Right to services only—Declaration and publication of acquisition, form of—Land Redemption Ordinance, No. 61 *of* 1942, *s.* 3 (1) (*b*)—*Land Acquisition Act, No.* 9 *of* 1950, *s.* 5 (1)—*Service Tenures Ordinance, No.* 4 *of* 1870, *s.* 25.

By section 3 of the Land Redemption Ordinance, 1942, of Ceylon: "(1) The Land Commissioner is hereby authorised to "acquire on behalf of Government the whole or any part of any "agricultural land, if the Land Commissioner is satisfied that that "land was, at any time" not earlier than January 1, 1929, "(*b*) transferred by the owner of the land to any other person in "satisfaction . . . of a debt which was due from the owner to such "other person and which was, immediately prior to such transfer, "secured by a mortgage of the land."

Agricultural land which the second respondent held in perpetuity as a paraveni nilakaraya under a system of tenure prevalent in the Kandyan Provinces of Ceylon (a temple being here entitled to services in respect of the land) was mortgaged by him, and in 1931 transferred by him to the mortgagee in satisfaction of the debt secured by the mortgage. Title to the land passed from the mortgagee to the first respondent under an undisputed chain of title. The land having thereafter been compulsorily acquired by the Crown under the provisions of the Land Redemption Ordinance, 1942, the first respondent, alleging that he and his predecessors in title held the land as paraveni nilakarayas and that a paraveni nilakaraya was not an "owner" within the meaning of section 3 of the Ordinance, contended that the Land Commissioner had therefore no authority to acquire the land and brought this action for a declaration of title to, and possession of, it:—

Held, that a paraveni nilakaraya was an "owner" within the meaning of section 3 of the Ordinance; that the Land Commissioner did not act in excess of his powers under that section, and that the land had validly vested in the Crown.

Majority view in *Appuhamy* v. *Menike* (1917) 19 N.L.R. 361, that a paraveni nilakaraya is an owner, approved.

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* *Present*: LORD TUCKER, LORD KEITH OF AVONHOLM, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

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"Owner" in the Ordinance meant a person possessing the essential attributes of ownership under the general law of Ceylon—the right of possession and the right to recover possession, the right of use and enjoyment, and the right of disposition—and there was nothing in the context of the Ordinance which required a modification of the general meaning. After the passing, and by virtue of the provisions, of the Service Tenures Ordinance, 1870, a paraveni nilakaraya could not be ejected for non-performance of services or non-payment of dues (where the former had been commuted for payment of the latter), and it was not disputed that he had the right to the use and enjoyment of the land, the right to dispose of it and the right to sue for and recover possession if he was disturbed. He had, therefore, all the rights which entitled him to be regarded as an owner. Although he did not possess "full ownership in that the ninda lord [here the temple] holds a perpetual right to services, the obligation to perform which attaches to the land" (*Appuhamy* v. *Menike*, 19 N.L.R. 361 at 363), "full ownership" in that sense, in view of the object and scope of the Land Redemption Ordinance, was not necessary to come within the meaning of "owner" in that Ordinance.

Dicta of Howard C.J. in *Bandara* v. *Dingiri Menika* (1943) 44 N.L.R. 393, that "The only clog on the full ownership of the nilakaraya is the obligation to perform services. Relief from such obligation would therefore confer full ownership," approved.

A ninda lord had not the right of possession, and could not sell or otherwise dispose of the holding of the paraveni nilakaraya; he had no right of use and enjoyment, but only a bare right to services or dues and could not possibly be regarded as the owner. Even if the act of acquisition by the Crown of the ninda lord's (temple's) right to services was unauthorised it did not vitiate the acquisition of the first respondent's rights.

To comply with section 5 (1) of the Land Acquisition Act, 1950, which requires the Minister to "make a written declaration" that land "will be acquired under this Act, and shall direct the acquiring officer . . . to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette," publication has to be in three langages (as was the case here), the declaration (which was here in English only) need only be in one.

Judgment of the Supreme Court of Ceylon (1958) 60 N.L.R. 193 reversed.

APPEAL (No. 20 of 1959) from a judgment and decree of a Divisional Bench of the Supreme Court of Ceylon (Basnayake C.J., Pulle and De Silva JJ.) (March 6, 1958) allowing an appeal from a judgment and decree of the District Court of Colombo (February 7, 1956).

The following facts are taken from the judgment of the Judicial Committee: The first respondent instituted this action in the District Court of Colombo against the Attorney-General of Ceylon (the appellant on this appeal) and the second respondent for a declaration of title to, and possession of, two parcels of land which had belonged to the first respondent and which had been acquired by the Crown under the provisions of the Land Redemption Ordinance, No. 61 of 1942, while in his possession and ownership. After acquisition the Crown had placed the second respondent in possession. The first respondent's contention was that the acquisition had been in excess of the powers conferred by the Land Redemption Ordinance. The Attorney-General denied the contention and also raised certain other defences.

Section 3 of the Land Redemption Ordinance was to the following effect: " 3. (1) The Land Commissioner is hereby autho- " rised to acquire on behalf of Government the whole or any part " of any agricultural land, if the Land Commissioner is satisfied " that that land was, at any time before or after the date " appointed under section 1, but not earlier than the first day of " January, 1929, either—(*a*) sold in execution of a mortgage " decree, or (*b*) transferred by the owner of the land to any other " person in satisfaction or part satisfaction of a debt which was " due from the owner to such other person and which was, " immediately prior to such transfer, secured by a mortgage of " the land."

Subsections (2) and (3) had no bearing on the present appeal.

" (4) The question whether any land which the Land Commis- " sioner is authorised to acquire under subsection (1) should or " should not be acquired shall, subject to any regulations made in " that behalf, be determined by the Land Commissioner in the " exercise of his individual judgment; and every such determina- " tion of the Land Commissioner shall be final."

A part of subsection (5) was: " (5) Where the Land Commis- " sioner has determined that any land shall be acquired for the " purposes of this Ordinance, the provisions of the Land Acquisi- " tion Ordinance, subject to the exceptions, modifications and " amendments set out in the First Schedule, shall apply for the " purposes of the acquisition of that land; . . ."

The rest of subsection (5) had no bearing on the present appeal.

The Land Commissioner was the officer entrusted with the administration of the Land Redemption Ordinance.

The first respondent had derived title in the following manner from the second respondent who had held the lands as a paraveni nilakaraya under a system of tenure prevalent in the Kandyan

Provinces of Ceylon where they were situate. The second respondent had on May 26, 1926, mortgaged the lands to one Allis. Thereafter the second respondent in satisfaction of the debt secured by the mortgage transferred the property to Allis. Title passed from Allis to the first respondent under an undisputed chain of title. The first respondent contended that a paraveni nilakaraya was not an " owner " within the meaning of the term in section 3 of the Ordinance and that, therefore, the terms of that section not being satisfied, the Land Commissioner had no authority to acquire the land. The appellant contended that a paraveni nilakaraya was an " owner " within the meaning of that word in the Ordinance. That was the main point in dispute between the parties.

The District Court dismissed the action. This decision was reversed on appeal by the Supreme Court (the principal judgment was delivered by Basnayake C.J.) which upheld the first respondent's contention, rejected the other defences and directed that a decree be entered in the first respondent's favour. From that order the Attorney-General now appealed.

1960. May 30, 31; June 1, 2. *E. F. N. Gratiaen* (*Q.C.* Ceylon) and *Walter Jayawardena* for the appellant. It is not disputed that if the Land Commissioner's determination to acquire the land under section 3 of the Land Redemption Ordinance was ultra vires, then the Minister's declaration under section 5 (1) of the Land Acquisition Act, 1950, was equally invalid. The real question—there is no dispute as to the nature of the tenure—is who is the " owner " of land of this nature within the meaning of this particular Ordinance. The submission is that, having regard to the manifest object of the Land Redemption Ordinance, the paraveni nilakaraya is the owner within the meaning of the Ordinance. The ninda lord is not the owner in any sense of the term, but even if he is, he is not the kind of owner the legislature had in mind. The better judicial opinion is that for all relevant purposes the paraveni nilakaraya is regarded as occupying the position of owner, whose possession is merely burdened by the obligation to perform certain services in favour of the ninda lord—largely personal services—which would be very much in the nature of incumbrances. He is certainly not a tenant—he cannot be ejected; he has a right to mortgage. The Service Tenures Ordinance, 1870 (Legislative Enactments, 1938, c. 323), ss. 7, 9, 14, 15, 24 and 25, is legislative recognition of the right to mortgage and create incumbrances. The accepted view is that if the paraveni nilakaraya transfers the land to somebody else, which he undoubtedly has the right to do, in a sense the obligation in respect of services goes with the land, being attached to the owner for the time being—it is a personal obligation which runs with the land—and that is the only right which can be extinguished by lapse of time; the right of possession can never lapse. There is high authority that the Kandyan and the Roman-Dutch views are exactly the same, and that the rights of sale and mortgage were vested only in the person who had the permanent right of use and occupation.

The later decisions are in the appellant's favour, and very strong reliance is placed on *Appuhamy* v. *Menike*,[1] which is still the leading case. [Reference was made to Sawers' Digest of Kandyan Law (1921), pp. 1 (note), 43–44.] The right of the paraveni nilakaraya to alienate the property was recognised as early as 1851 (*Basnaike Nilleme* v. *Mudianse* [2]), and there was no right to eject him. The ultimate submission is that where there are so many different theories, "owner" must mean the only person who can effectively give possession of the property. That the really effective owner is the temple (the ninda lord) brings about a most unrealistic result, because the temple could not mortgage the land, and never had possession of it. In many contexts the Supreme Court since 1870 have accepted the paraveni nilakaraya as being the owner of the property in the sense that he had a right to bring a rei vindicatio action, which is only available to an owner (*De Silva* v. *Goonetileke* [3])—the cause of action is proof of his title—and is the true owner within the Partition Ordinance, except that there were individual services. *Jotihamy* v. *Dingirihamy* [4] and *Kaluwa* v. *Rankira* [5] are against the appellant here. The later cases take a different view: *Ranhamy* v. *Asin Umma*.[6] *Kiriduraya* v. *Kuda Duraya* [7] is an interesting case as showing one of the few ways in which the ninda lord can become the owner—by adverse possession. Then in *Appuhamy's* case [8] all the relevant authorities were considered; the ratio decidendi of that case was, it is submitted, misunderstood by the Chief Justice in the present case. That judgment takes the view that the paraveni nilakaraya had real ownership subject only to the performance of services, and completely excludes the idea of the ownership being vested in the ninda lord.

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[1] (1917) 19 N.L.R. 361.
[2] (1848–55) Ramanathan 159.
[3] (1931) 32 N.L.R. 217, 219.
[4] (1906) 3 Balasingham 67.
[5] (1907) 3 Balasingham 264.
[6] (1915) 1 C.W.Rptr. 151.
[7] (1916) 3 C.W.Rptr. 188.
[8] 19 N.L.R. 361.

The only right which a ninda lord retained after 1870 was a personal right to claim services. Two cases which may be of assistance are to be found in Perera's Kandyan Law, case 3 [9] and case 4.[10] A much more helpful case is in Marshall's Judgments.[11]

It is conceded on those authorities that before 1870 it would appear that even in respect of a paraveni nilakaraya's rights the ninda lord enjoyed more than a mere enforceable right to claim services; and it would appear that originally a ninda lord exercising the jurisdiction which he had could punish the paraveni nilakaraya by forfeiting the right to possession and by taking over the possession himself. Later it would appear that after the British rule had commenced the courts alone exercised the jurisdiction of ordering forfeiture for failure to provide services, and in ordering such forfeiture have said the ninda lord gets possession on the dispossession of the paraveni nilakaraya. It is not conceded that that situation necessarily meets the contention that before dispossession of the paraveni nilakaraya the ninda lord's rights were rights of ownership. The correct analysis would be that until dispossession a paraveni nilakaraya would be the owner, and that after his dispossession the ninda lord would become the owner.

In the concept of transactions of sale, transfer and mortgage the idea or notion of absolute dominium is quite irrelevant, it is only ownership which is fundamental—that is, ownership as defined by Maasdorp's Institutes of South African Law (1948), vol. 2, p. 36, and referred to by Ennis J. in *Appuhamy's* case.[12] The submission is that after 1870 the paraveni nilakaraya had all the rights of ownership which the Roman-Dutch law requires as essential for an effective transfer or mortgage of the land. He had the right to dispose—an unfettered right of alienation; the right to transmit to his heirs; the right to hold in perpetuity without liability to ejectment. [Reference was made to Sawers' Digest, p. 14 (note), and to Modder's Kandyan Law (1914), p. 606, para. 309.] There appears to be no authority for the proposition that there is a reversion to the ninda lord if the line of succession of nilakarayas becomes extinct. By 1870 the ninda lord was stripped of the last vestige of what one would normally associate with ownership, and by " ownership " is not meant physical occupation but the right to possess. *Tillekeratne* v. *Dingey Hamy* [13] does not support what the Chief Justice said here—that "a ninda lord can sell" the land—there is nothing in that case to suggest that they were considering the paraveni nilakaraya; and see Hayley's Sinhalese Laws and Customs, 1923 ed., p. 244. [Reference was also made to *Samarasinghe* v. *Radage Weerapulia.*[14]] The cases where the Chief Justice suggests that rights of ownership did survive are, it is submitted, not apt.

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[9] (1844) Perera's Kandyan Law 312 (Case No. 3).

[10] (1844) Ibid. (Case No. 4).

[11] (1834) Marshall's Judgmts. 301.

[12] 19 N.L.R. 361, 363.

[13] (1860–62) Ramanathan 144.

The judgment of De Sampayo J. in *Appuhamy's* case [15] should commend itself to the Board because of his wide experience in this connection. The matter has been placed beyond all doubt by *Bandara* v. *Dingiri Menika*,[16] where it was held that once the right of the overlord to services had been lost by prescription, then the only clog on the ownership of the paraveni nilakaraya was removed, and he was owner in every sense and entitled as owner to have partition. That case is strongly relied on to establish the proposition that the Supreme Court has completely discarded the theory that it is the ninda lord who is the owner subject to the paraveni nilakaraya's right to occupy the land in a subordinate capacity. Certainly since 1870 all the rights which comprised ownership in immovable property are vested in the paraveni nilakaraya, and his liability to perform services or to pay dues to the ninda lord in no way reduced the rights of ownership which entitled him to alienate or to mortgage the land itself. The ninda lord under the old Kandyan law had no mineral rights whatsoever, nor had he a claim to rights in the timber: *Ratwatte* v. *Rahiman* [17]; *Molligodde Umambawa* v. *Puncha Weda* [18]; *Siripina* v. *Kiribanda Korala* [19]; Haley's Sinhalese Laws and Customs, p. 283. Lee's An Introduction to Roman-Dutch Law, 5th ed., p. 121, is relied on to support the submission that whatever description he gives to the ninda lord's right to services it does not operate even as a restriction of the paraveni nilakaraya's essential rights of ownership, namely, his right to possess, to use and to alienate. [Reference was also made to Grotius, Jurisprudence of Holland, Lee's edition (1936), p. 79.]

Jayawardene, following, referred to *Caley* v. *Kirimenika* [20] and to Maasdorp's Institutes (1918 ed.), Bk. 2, p. 33.

Sirimevan Amerasinghe for the first respondent. As to the position and rights of the paraveni nilakaraya, the original concept which was part of the feudal tenure from the beginning still remains at the present date, and the interest which the paraveni nilakaraya has in the land falls short of ownership. It is fundamental that there must be a ninda lord and a nilakaraya, and Haley in his Sinhalese Laws and Customs says at p. 252: "The "paraveni interest of such tenants being, however, conditioned "on the performance of services, they are not regarded by the "modern courts as owners of their pangus in the strict sense of "the term." He makes that statement having the authorities before him. *Ratwatte* v. *Rahiman*[21] does not bring the paraveni nilakaraya within the term "owner" in the strict sense. On the above authorities the question whether he is an owner is left in doubt and, that being so, the appellant's case fails. Further, the Chief Justice in the present case was right when he said[22]: "The acquiring officer appears to have acquired the interests of "the dewale as well. His act is clearly illegal. The paraveni "nilakaraya did not, and could not in law, transfer to his "creditor the rights of the ninda lord, the dewale, nor did he "purport to do so. . . . The ninda lord owed no debt, his rights "were not secured by a mortgage, he did not transfer his rights to "the second defendant. Clearly the Land Commissioner had "no authority to acquire the ninda lord's rights . . . The Land "Commissioner's action in acquiring the interests of the "nilakaraya and the dewale are both illegal and must be declared "null and void." When the Land Commissioner came to consider who was the owner in respect of this particular land, the question must be answered having regard to the situation of the land and the incidents of tenure there, and side by side with the Land Redemption Ordinance there was this body of Kandyan common law to which the Land Commissioner in administering the Ordinance had to pay due regard.

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[14] (1882) 5 Sup.Ct.Cir. 40.
[15] 19 N.L.R. 361, 366.
[16] (1943) 44 N.L.R. 393, 395.
[17] (1921) 23 N.L.R. 155.
[18] (1872–76) Ramanathan 226.
[19] (1878) 5 N.L.R. 326.
[20] (1880) 3 Sup.Ct.Cir. 18.

It is not sufficient for the appellant here to establish something "nearly akin" to ownership; he must go further and show affirmatively that he is the owner: *Ranhamy* v. *Asin Umma.*[23] On the authority of *Bandara* v. *Dingiri Menika*[24] the paraveni nilakaraya becomes owner, if at all, when the right of the ninda lord to services has been lost. The situation in that case has not arisen here and that case does not apply. The cases referred to in the judgment of De Sampayo J. in *Appuhamy's* case,[25] which is relied on by the appellant, are all post-1870 cases. *Kiriduraya* v. *Kuda Duraya*[26] is saying in effect that the paraveni nilakaraya is not an owner within the contemplation of the Land Redemption Ordinance. [Reliance is placed on *Abayavere* v. *Fernando* [27] and *Siripina's* case.[28] It is not possible, on the authorities, to say that the paraveni nilakaraya is the owner; the transfer here was not by the "owner" of the land in question.

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[21] 23 N.L.R. 155.
[22] (1958) 60 N.L.R. 193, 211.
[23] 1 C.W.Rptr. 151.
[24] 44 N.L.R. 393.
[25] 19 N.L.R. 361.
[26] 3 C.W.Rptr. 188.

Lastly, the declaration of the Minister was in English alone, whereas section 5 of the Land Acquisition Ordinance, 1950, requires him to make it in each of the three languages, English, Sinhalese and Tamil. The omission to make the declaration in the three languages affects its validity.

Gratiaen in reply. The definition of "ownership" by Maasdorp is particularly apt in the context of the scheme of this Ordinance; the paraveni nilakaraya had the exclusive right of disposing of the corporeal thing. As to the objection that the declaration is not in three languages, the appellant produced a certified copy of the actual declaration, and that is sufficient. Subsection (1) of section 5 of the Land Acquisition Act does not require that the declaration should be in the three languages, but only the publication, and that was so here. Further, there is a presumption that all official acts have been regularly performed: Evidence Ordinance (Legislative Enactments, 1938, c. 11), s. 114.

July 25. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above, and continued: The scheme of the Land Redemption Ordinance, broadly stated, was to empower the Crown compulsorily to acquire agricultural land which had been lost on or after the first day of January, 1929, by a mortgagor in circumstances stated in the Ordinance, and thereafter to place him (or certain other persons in a defined category) in possession of the said land under the provisions of another Ordinance, namely, the Land Development Ordinance.

The word "owner" in the Land Redemption Ordinance, in the absence of definition in the Ordinance itself, must mean a person possessing the attributes of ownership under the general law at the time the Ordinance was passed, subject to such modification, if any, as may be imposed upon it by the context.

Lee (Introduction to Roman Dutch Law, 5th ed., p. 121) in a chapter headed "The Meaning of Ownership," reflecting the views of Van der Linden, says: "Dominion or ownership is the "relation protected by law in which a man stands to a thing

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[27] (1872–76) Ramanathan 256.

[28] 5 N.L.R. 326.

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"which he may: (*a*) possess, (*b*) use and enjoy, (*c*) alienate. The "right to possess implies the right to vindicate, that is, to recover "possession from a person who possesses without title to possess "derived from the owner."

Grotius in Book 2, chapter 3, of his Introduction to the Jurisprudence of Holland, says: "Ownership is the property in a "thing whereby a person who has not the possession may acquire "the same by legal process." Commenting on this, Lee says (p. 121) "Grotius selects this right as the most signal quality of "ownership."

Maasdorp (vol. 2, p. 27) says the rights of an owner are "comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and "enjoyment; and (3) the right of disposition." He goes on to say "these three factors are all essential to the idea of ownership "but need not all be present in an equal degree at one and the "same time."

Their Lordships are of opinion that the possession of the rights mentioned are generally sufficient to constitute a person an owner under the law of Ceylon. They also think there is nothing in the context of the Land Redemption Ordinance which requires a modification of the general meaning.

The next question is whether a paraveni nilakaraya can properly be regarded as an owner. It is common ground that a "nilakaraya" holds an allotment of land (known as a "pangu") subject to the performance of services for, or payment of dues to (where the performance of services had been commuted for the payment of dues) an "overlord" (referred to very appropriately by the Chief Justice in his judgment and hereafter by their Lordships as the "ninda lord"). Sometimes (as in the present case) a temple was the ninda lord. It is also common ground that the type of nilakaraya known as a "maruwena nilakaraya" holds the land as a tenant at will, and the type known as a "paraveni "nilakaraya" (second respondent belonged to this type) holds the land in perpetuity. It was, as stated by the Chief Justice, a "hereditary holding." The Chief Justice makes a forceful point in support of the view that a paraveni nilakaraya must be regarded as a tenant and not as an owner, when he points out that in certain legislation language is used which seems to imply that a paraveni nilakaraya must be regarded as a tenant and not as an owner. For instance, in section 27 of the Buddhist Temporalities Ordinance (Volume V, Ceylon Legislative Enactments, p. 655) the words "a paraveni pangu tenant's interest" are used. The

Service Tenures Ordinance, 4 of 1870 (Volume VI, Ceylon Legislative Enactments, p. 657) uses the words " nindagama proprietor " to designate a ninda lord: " ' nindagama proprietor ' shall mean " any proprietor of nindagama entitled to demand services from " any paraveni nilakaraya or maruwena nilakaraya, for and in " respect of a paraveni pangu or maruwena pangu held by " him; . . ."

This language normally, in the absence of other relevant material, would afford strong reason for the conclusion that a paraveni nilakaraya does not occupy the status of an owner. But ultimately the question whether a person is an owner or not must be determined by the rights and attributes he possesses in law. If those attributes clearly establish his position as owner the considerations which arise from the language referred to above must give way.

The " rights of a paraveni nilakaraya in respect of his holding " became enlarged in the course of time," as stated by the Chief Justice, and this fact, with its accompanying uncertainty as to what those rights were at any particular time, probably led to some confusion, particularly in the language by which they were sometimes described.

Following on a report by a commission called the Service Tenures Commission an Ordinance, The Service Tenures Ordinance, 4 of 1870, was passed. It was, as stated by de Sampayo J. in *Appuhamy* v. *Menike*,[1] on most points declaratory. Whatever the position was before the Ordinance was passed, after its passage its provisions must be accepted to the exclusion of all contending views that may previously have existed. And, though historical research into those contending views may be interesting, it cannot modify the clear provisions of the Ordinance. In section 2 a paraveni nilakaraya is said to be " the holder of a " paraveni pangu in perpetuity, subject to the performance of " certain services to the temple or nindagama proprietor "; a " paraveni pangu " is said to be " an allotment or share of land " in a temple or nindagama village held in perpetuity by one or " more holders, subject to the performance of certain services to " the temple or nindagama proprietor." Section 24 is to the following effect:

" 24. Arrears of personal services in cases where the paraveni " nilakaraya shall not have commuted shall not be recoverable for " any period beyond a year; arrears of commuted dues, where the

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[1] (1917) 19 N.L.R. 361.

"paraveni nilakaraya shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years, and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost for ever, and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefor: . . ."

A proviso to the section has no bearing on this case.

It is common ground that the services to be rendered were personal. Section 25 is to the following effect: "25. It shall be lawful for any proprietor to recover damages in any competent court against the holder or holders of any paraveni pangu who shall not have commuted, and who shall have failed to render the services defined in the registry hereinbefore referred to. In assessing such damages, it shall be competent for the court to award not only the sum for which the services shall have been assessed by the Commissioners for the purpose of perpetual commutation, but such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the nilakaraya or nilakarayas to render such personal services at the time when they were due; but it shall not be lawful for any proprietor to proceed to ejectment against his paraveni nilakaraya for default of performing services or paying commuted dues; the value of those services or dues shall be recoverable against such nilakaraya by seizure and sale of the crop or fruits on the pangu, or failing these, by the personal property of such nilakaraya, or failing both, by a sale of the pangu, subject to the personal services, or commuted dues in lieu thereof, due thereon to the proprietor. The proceeds of such sale are to be applied in payment of the amount due to the proprietor, and the balance, if any, shall be paid to the evicted nilakarayas, unless there should be any puisne incumbrance upon the holding, in which case such balance shall be applied to satisfy such incumbrance."

This is what the Ordinance declared the law to be and was the law after the Ordinance came into force.

It will be seen that a paraveni nilakaraya cannot be ejected for non-performance of service or non-payment of dues. This means that he is subject to no liability similar to that of forfeiture. Moreover, he is accorded a right of possession in respect of his holding superior to the general rights of an owner. The latter in respect of a judgment debt is liable to have any part of his property proceeded against in execution. But a paraveni nilakaraya's holding may be proceeded against on a judgment for damages for non-performance of services or for non-payment of dues only after certain property belonging to him has been exhausted. It was not disputed that he had the right to the use and enjoyment of the land, the right to dispose of it, and the right to sue for and recover possession if he was disturbed. He has, therefore, all the rights which entitle him to be regarded as an owner.

Their Lordships are in complete agreement with the view expressed by Ennis J. in *Appuhamy* v. *Menike*,[2] when he said: "In my opinion a paraveni nilakaraya holds all the rights which, "under Maasdorp's definition, constitute ownership, but he, "nevertheless, does not possess the full ownership, in that the "ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land." Considering the object and scope of the Land Redemption Ordinance, their Lordships do not think that "full ownership" in the sense in which the word is used in the passage quoted is necessary to come within the meaning of the word "owner" in that Ordinance.

The case of *Appuhamy* v. *Menike* [2] needs further comment. The question which arose in that case was whether a paraveni nilakaraya could bring an action under the Partition Ordinance, 10 of 1863, to partition a holding which he held with others. Two points had to be decided. The first, whether a paraveni nilakaraya was an owner, the second was whether the nature of the services to be rendered made the Ordinance inapplicable. There had previously been a conflict of authority and the case on appeal was referred for an authoritative decision to a bench of three judges of the Supreme Court, Ennis, de Sampayo and Shaw JJ. (normally two judges would have decided the appeal). On the question of ownership Ennis J. came to the conclusion set out above. De Sampayo J. said[3]: "I am of opinion that paraveni "nilakarayas are the owners of the land." Shaw J. dissented. It will be seen that the majority of the court were of opinion that a paraveni nilakaraya is an owner. With this view their Lordships are in entire agreement.

With all respect to the Chief Justice their Lordships cannot agree with the view expressed by him that two of the judges in that case held that "a paraveni nilakaraya is not the owner of his

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[2] 19 N.L.R. 361, 363.

[3] Ibid. 369.

"holding," and that de Sampayo J. alone dissented from that view.

All the judges were agreed that in their opinion a partition was incompatible with the nature of the services to be rendered (their Lordships find it unnecessary in the present case to express an opinion upon this view) and rejected the appeal on that ground. The most that can be urged is that the case decided that a paraveni nilakaraya is not an "owner" within the special meaning of the term imposed upon it by the context of the Partition Ordinance as the services that had to be rendered were not capable of division, but this does not affect the general meaning of the word or its meaning in the Land Redemption Ordinance.

As already stated, a paraveni nilakaraya possesses all the essential attributes which a person must possess before he can be regarded as an owner. As for the "ninda lord," he has not the right of possession. He cannot even enter into possession for non-fulfilment of services or non-payment of dues. Further, the right to possession of the paraveni nilakaraya has the special protection of the law already indicated. The "ninda lord" cannot sell or otherwise dispose of the holding of the paraveni nilakaraya. He has no right of use and enjoyment. He has a bare right to services. Their Lordships do not think he can possibly be regarded as the owner.

The Chief Justice relied on a passage in Salmond on Jurisprudence (11th ed., p. 302) to the effect that a person could be "the "owner of a material object who has a right to the general or residuary uses of it, after the deduction of all special and limited "rights of use vested by way of encumbrance in other persons." Their Lordships are of the view that a ninda lord could not properly be regarded as being in that position. He has no general or residuary rights at all. He has, as already stated, the bare right to services or dues. Under section 24 of the Service Tenures Ordinance the ninda lord loses his rights to these services (or dues) if they have not been rendered (or paid) for 10 years, and no action has been brought for them within those 10 years. It was held by Howard C.J. (Keuneman J. agreeing) in *Bandara* v. *Menika*,[4] that in such circumstances a paraveni nilakaraya became the full owner. Howard C.J. said[5]: "the only clog on the full ownership of "the nilakaraya is the obligation to perform services. Relief from "such obligation would, therefore, confer full ownership."

Their Lordships agree.

[4] (1943) 44 N.L.R. 393.

[5] Ibid. 396.

It was argued that a ninda lord had a right to minerals and timber on the land which prevented the nilakaraya from being regarded as the owner. Their Lordships are of opinion that such rights, if they exist, are extremely limited and do not affect the considerations set out above.

In the acquisition proceedings the right to the services which had to be performed by whoever owned the land for the ninda lord appears to have been acquired by the Government on payment of compensation. On this the Chief Justice said [6]: "The acquiring "officer appears to have acquired the interests of the dewale as "well. His act is clearly illegal. The paraveni nilakaraya did not, "and could not in law, transfer to his creditor the rights of the "ninda lord, the dewale, nor did he purport to do so. The "authority granted by section 3 (1) (*b*) is to acquire land trans-"ferred by the owner in satisfaction or part satisfaction of a debt "which was due from the owner and which was immediately "prior to such transfer secured by a mortgage of the land. The "ninda lord owed no debt, his rights were not secured by a "mortgage, he did not transfer his rights to the second defendant. "Clearly the Land Commissioner had no authority to acquire "the ninda lord's rights and his determination to acquire his "rights being illegal cannot be final."

It has been argued against this view that although a land subject to the performance of services was transferred by the owner authority is conferred to acquire the land as a total entity free from the performance of services, the person entitled to services being duly compensated. Their Lordships find it unnecessary to decide this question in the present case. No objection was raised by the ninda lord, who appears to have acquiesced in the acquisition. If he had objected such action, if any, as would have been necessary, could have been taken. The acquisition of the ninda lord's rights has not affected the first respondent's rights. Their Lordships are of opinion that even if the act of acquisition of the right to services was unauthorised it does not vitiate the acquisition of the first respondent's rights.

The Chief Justice has held that the provision in subsection (4) of section 3 of the Land Redemption Ordinance, namely, "(4) "The question whether any land which the Land Commissioner "is authorised to acquire under subsection (1) should or should "not be acquired shall, subject to any regulations made in that "behalf, be determined by the Land Commissioner in the exercise

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[6] (1958) 60 N.L.R. 193, 211.

"of his individual judgment; and every such determination of the "Land Commissioner shall be final," does not make final any decision made by the Land Commissioner in excess of the powers conferred by subsection (1). With this their Lordships agree. The point was not pressed by the appellant before their Lordships and it is not necessary to discuss it further.

Section 5 (1) of the Land Acquisition Act, 9 of 1950, is to the following effect: "5. (1) Where the Minister decides under "subsection (5) of section 4 that a particular land or servitude "should be acquired under this Act, he shall make a written "declaration that such land or servitude is needed for a public "purpose and will be acquired under this Act, and shall direct "the acquiring officer of the province or district in which the land "which is to be acquired or over which the servitude is to be "acquired is situated to cause such declaration in the Sinhalese, "Tamil and English languages to be published in the Gazette and "exhibited in some conspicuous places on or near that land."

A copy of the declaration in English alone was produced. The Chief Justice said[7]: "I am of the view that subsection (1) of "section 5 of the Act requires the Minister to make a declaration "in each of the three languages and the requirements of the "section are not satisfied if he does not do so." Their Lordships cannot agree. Publication has to be in three languages, the declaration need only be in one.

The Chief Justice also said[7]: "Subsection (1) of section 5 "further requires the Minister to direct the acquiring officer of "the province or district in which the land which is to be acquired "is situated to cause such declaration in the Sinhalese, Tamil "and English languages to be published in the Gazette and "exhibited in some conspicuous places on or near the land. There "is no evidence that such a direction was given nor is there any "evidence that the acquiring officer of the province or district "in which the land is situated caused the declaration to be "published in the Gazette in Sinhalese and Tamil. Learned "counsel for the Crown tendered at the trial, not the Gazette in "which the declaration was published, but an extract from the "Government Gazette certified by an Assistant Land Commis-"sioner 1D2 in which the declaration appears in the English "language alone." He went on to say[8]: "Apart from the fact "that the declaration is invalid for the reason that the condition "precedent to the making of the declaration is absent, these

[7] 60 N.L.R. 193, 213.

[8] Ibid. 214.

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"other defects I have pointed out above also affect its validity." There is a presumption that "official acts have been regularly "performed" (section 114, Ceylon Evidence Ordinance) that should in proper cases be acted upon. This was such a case. In the courts in Ceylon the respondent did not raise any question as to due direction by the Minister or due publication in the Gazette. Further, counsel for the first respondent was constrained to admit on an inspection of the relevant gazette (produced by the appellant) that publication in three languages had been made. Subsection (3) of section 5 says: "(3) The publication of a declaration under subsection (1) in the Gazette shall "be conclusive evidence of the fact that such declaration was duly "made."

From what has been said it follows that the Land Commissioner did not act in excess of his powers under section 3 of the Land Redemption Ordinance, and that the steps taken have vested the land in the Crown which, therefore, had the right to place the second respondent in possession. Their Lordships consequently find it unnecessary to express an opinion upon the submission made by the appellant that a decision under section 3 (1) of the Land Redemption Ordinance is a judicial decision and can be attacked only by writ of certiorari in proceedings before the Supreme Court, or to comment on the other defences raised in the case.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court set aside and the decree of the District Court restored. The first respondent must pay the costs of this appeal and of the hearing before the Supreme Court.

Solicitors: *T. L. Wilson & Co.; A. L. Bryden & Williams.*

C. C.

VERE CORNWALL BIRD AND OTHERS . . . APPELLANTS;

AND

JOSEPH REYNOLD O'NEAL AND ANOTHER . RESPONDENTS.

J. C.*

1960
July 26.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

Vicarious Liability—Trade dispute—Picketing—Whether pickets servants of individual members of executive committee.

Nuisance—Trade dispute—Picketing—Threats of violence and intimidation—Damages and injunction against participants.

Trade Dispute—Act in furtherance of—Lawful dismissal of workman—Whether subject of trade dispute—Meaning of "trade dispute"—Meaning of "workman"—Shop assistant—Meaning of "labourer"—Trade Unions Act, 1939 (*Leeward Islands, No.* 16 *of* 1939), *s.* 2.

After the respondents had summarily dismissed a clerk employed by them on a weekly basis and paid her a week's wages in lieu of notice, the executive committee of the trade union to which she belonged, after ineffective steps had been taken to obtain for her reinstatement or compensation, passed a resolution authorising their general secretary to take the necessary steps to picket the business premises of the respondents. Pickets were thereupon engaged by J. (the organiser) and the general secretary, who were both members of the executive committee. In an action by the respondents against the appellants, who were the eight members of the executive committee (including J. and the general secretary) and S. (not a member of the committee) as the chief picket, claiming damages and an injunction restraining "the defendants their servants and "agents from unlawfully watching and besetting" the respondents' business premises it was pleaded, inter alia, that the defendant J. and the pickets had "by threats and acts of violence and intimida-"tion and coercion" prevented prospective customers from entering the premises. The respondents claimed alternatively that the appellants had created a nuisance. It was found as a fact by both courts below that intimidation and threats of violence were used by the pickets against prospective customers:—

Held, that the concurrent findings of fact clearly established that intimidation and threats of violence were used by the pickets to an extent which amounted to an actionable nuisance. The pickets, however, were not the servants of the individual appellants; they were appointed by the union, which could, of course, only act by agents, in this case the executive committee and the general secretary, but that did not create the relationship of master and servant between the individual members of the executive committee and the pickets so as to make the former responsible for the acts of the latter (post, p. 919–920).

There was evidence, however, that J. (the organiser) and S.

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* *Present*: LORD RADCLIFFE, LORD TUCKER and LORD COHEN.

(the chief picket) were present and actively assisting in picketing which constituted a nuisance and had caused damage to the respondents' trade, and they were therefore each responsible for the tort in the commission of which they had assisted, and were liable in damages and to an injunction against the continued commission of the nuisance.

By section 2 of the Trade Unions Act, 1939, of the Leeward Islands: "'Workmen' includes labourers." "'Trade dispute' "means any dispute or difference between employers and workmen ". . . connected with the employment or non-employment . . . of "any person."

In the absence of words of limitation, "workmen" in section 2 of the Act of 1939 should not exclude shop assistants.

The lawful dismissal of a workman can be the subject of a trade dispute (post, p. 925).

Dictum of Lord Wright in *Rex* v. *National Arbitration Tribunal, Ex parte Bolton Corporation* [1943] A.C. 166 at 189; 59 T.L.R. 1; [1942] 2 All E.R. 425, H.L. applied.

Order of the West Indian Court of Appeal discharged and judgment of the trial judge varied.

APPEAL (No. 22 of 1958), by special leave, from a judgment of the West Indian Court of Appeal (Mathieu Perez, Jackson and Holder C.JJ.) (April 25, 1957) dismissing an appeal from a judgment of Date J. (January 3, 1956) granting an injunction restraining the present appellants, their servants and agents, from watching and besetting the business places of the respondents and ordering the appellants to pay £80 to the respondents as damages for conspiracy. The West Indian Court of Appeal increased the damages to £100.

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of an action claiming damages and an injunction brought by the respondents against the appellants as a result of events which followed a resolution of the executive committee of the Antigua Trades and Labour Union authorising the general secretary to take the necessary steps to picket the business premises of the respondents. The circumstances leading up to the passing of this resolution are conveniently set out in the judgment of the trial judge, Date J., as follows:

"In May, 1949, one Averyl Winter was employed as a clerk "at the Drug Store on a weekly basis. She continued working "there until Saturday, June 11, 1955, when she was summarily "dismissed by the plaintiff, Gertrude O'Neal, and paid one "week's wages in lieu of notice; no reason was given for the "dismissal. Sunday, June 12, was, of course, a dies non.

"On Monday, June 13, the defendant Ireland, a field officer "of the Antigua Trades and Labour Union, of which Miss Winter "is a member, went to Miss O'Neal and asked for the reasons for "Miss Winter's dismissal. Miss O'Neal refused to give any. "Thereupon, according to Miss O'Neal, Mr. Ireland demanded "one year's pay for Miss Winter, and this was also refused.

"Representations were then made by the Union to the Labour "Commissioner of Antigua about Miss Winter's dismissal, and "conciliation meetings under his chairmanship were held at the "Labour Department between representatives of the Drug Store "and representatives of the Union on June 23 and July 7. At "both meetings the Union's representatives asked for the "reinstatement of Miss Winter. The representatives of the "Drug Store said that in dismissing Miss Winter without giving "reasons and paying her a week's wages in lieu of notice they "were acting within their legal rights, and that they were not "prepared to consider the claim for reinstatement. At the second "meeting a written undertaking was signed by Miss Winter to "the effect that nothing said there would be used by her in any "case of slander or libel; the representatives of the Drug Store "then stated five reasons which they said were the only reasons "for the dismissal. These were examined and severely criticised "by the Union's representatives, who expressed the view that "they proved nothing against Miss Winter and did not justify "her dismissal. As the representatives of the Drug Store persisted in their refusal to reinstate Miss Winter, the chairman "inquired whether they would be prepared to consider settling "the matter on a basis other than reinstatement, to which they "replied in the negative.

"The voluntary negotiations having broken down, the Union "approached Government for the appointment of a Board of "Inquiry under the Trade Disputes (Arbitration and Inquiry) "Act, 1939, section 8 (1) of which reads thus: '8 (1) Where any "'trade dispute exists or is apprehended the Governor may, "'whether or not the dispute is reported to him under this Act, "'inquire into the causes and circumstances of the dispute, and, "'if he thinks fit, refer any matter appearing to him to be connected with or relevant to the dispute to a Board of Inquiry "'(hereinafter referred to as "the Board") appointed by him "'for the purpose of such reference, and the Board shall inquire "'into the matters referred to it and report thereon to the "'Governor.'

"By instrument dated August 16, 1955, the then Acting

"Governor of the Leeward Islands appointed a Board of Inquiry "'to inquire into the causes of the dispute that arose over the "'dismissal of Miss Averyl Winter by the proprietors of O'Neal's "'Drug Store, St. John's, and to report thereon to the Governor "'and to submit to him such conclusions, recommendations and "'observations as the Board sees fit.'

"At the inquiry, which was held on August 24, Mr. E. E. "Harney, representing the plaintiffs, submitted in limine that "there was no trade dispute between Miss Winter and the Drug "Store and that the appointment of the Board was, consequently, "invalid. The gist of his contention was that the relationship of "employer and employee had been legally terminated by the "giving of a week's wages to Miss Winter in lieu of notice, and "that there could therefore be no trade dispute within the meaning of the Act under which the Board was operating. The "Board ruled that 'the terms of reference contained in the "'instrument dated August 16, 1955, which gave the Board its "'validity showed prima facie that there was a trade dispute "'existing between the proprietors of O'Neal's Drug Store and "'Miss Averyl Winter and therefore the Board had full power "'and authority to inquire into the dispute.' At this stage Mr. "Harney sought and was granted permission to withdraw from "the inquiry, and the plaintiffs took no further part in the proceedings, but the minutes of meetings at the Labour Department, which contained, inter alia, the reasons given by Miss "O'Neal for the dismissal of Miss Winter, were produced in "evidence and closely examined.

"In its report submitted to the Acting Governor on August 31, "1955, the Board, after setting out its findings, expressed the "opinion that there was no moral justification for the dismissal "of Miss Winter and, using as a norm one of the accepted "principles of good industrial relations, that is the principle of "mutual respect and tolerance of human rights between employer "and workman, recommended the proprietors of the Drug Store "be asked to pay her a sum equivalent to thirteen weeks' wages "'as a compensation for her dismissal.'

"Under cover of a letter from the Administrator of Antigua "dated September 6, 1956, a copy of the report was sent to Mr. "Harney for the information of his clients and himself 'and "'such action with the view to a settlement of the dispute as "'may be deemed advisable.' In a letter the Administrator also "informed Mr. Harney and his clients that the Acting Governor "agreed generally with the recommendations of the Board. The "plaintiffs ignored this communication, and on September 16 the "Administrator caused the report to be published in the local "press. The following day the plaintiffs' business premises were "picketed."

The picketing took place pursuant to the resolution referred to above of the executive committee of the Trades and Labour Union of September 9, 1955, which was as follows: "Be it "resolved that provided up to the time of the publication of the "Board's award the dispute between Miss O'Neal and the Trade "Union is not settled the general secretary should take the "necessary steps to picket the business premises." After the meeting the appellants Joseph (No. 7) and Hurst, the general secretary (No. 9), engaged six paid pickets to picket the respondent's business premises.

The appellants numbered 1 to 7 and number 9 were all members of the executive committee of the Union. Samuel (No. 8) was not a member but was described as the chief picket. Nos. 4 and 6 (Williams and Ireland) were not present at the meeting of the executive committee when the resolution was passed. Hurst in his evidence at the trial stated that he gave the pickets instructions to conduct themselves in an orderly manner and told them that their duty was to pass on information to members of the public with regard to the dispute and not to molest anyone.

Paragraphs 5–10 of the respondents' statement of claim were as follows:

"5. The first seven-named and the last-named defendants and "each of them wrongfully and maliciously conspired and com"bined amongst themselves (with intent to injure the plaintiffs "and thereby compel them to submit to the demand of the "Antigua Trades and Labour Union to pay compensation to one "Averyl Winter a former clerk in O'Neal's Drug Store who had "recently been lawfully dismissed from her employment by the "plaintiffs) wrongfully and without legal authority to watch and "beset or cause or procure to be watched and beset the said "business places of the plaintiffs and the approaches and "entrances thereto in such manner as was calculated to intimidate "customers and prospective purchasers.

"6. In furtherance and execution of their said conspiracy and "combination the said first seven-named and the last-named "defendants and each of them wrongfully and without legal autho"rity caused or procured the defendant Joseph Samuel and other

" persons to the number of 12 or thereabouts (hereinafter referred " to as the pickets) wrongfully and without legal authority to watch " and beset the said business places of the plaintiffs daily from the " 17th day of September, 1955, in such a manner as is calculated " to intimidate customers and prospective purchasers and to " obstruct the approaches thereto. The first seven-named and the " last-named defendants and each of them in acting as in this " paragraph stated acted for the purpose of intimidating and " preventing customers and prospective purchasers from entering " the said business places and purchasing therein.

" 7. The first seven-named and the last-named defendants on " several occasions on the 17th day of September, 1955, and on " divers other occasions thereafter attended outside the said business places of the plaintiffs or in the vicinity thereof and gave " encouragement to the said pickets.

" 8. The defendant Levi Joseph and the pickets have by " threats and acts of violence and intimidation and coercion " prevented divers customers and prospective purchasers from " entering the said business places and purchasing therein.

" PARTICULARS.

" (1) On the 17th day of September, 1955, the defendant " Levi Joseph led a steel band and a number of pickets carrying " placards to the said business places of the plaintiffs and " surrounded same blocking the approaches and entrances thereto " and shouting in a threatening manner to persons who attempted " to enter the said business places 'Don't buy from O'Neal's " 'Drug Store, a Strike is on.'

" (2) On the said 17th day of September, 1955, and on several " days thereafter the defendant Joseph Samuel who is well known " to the general public as a local constable paraded up and down " outside the said business places ringing a bell and shouting " 'Don't buy from O'Neal's Drug Store people. You no hear " 'you no foo buy from this Drug Store.' And when people " asked why not? defendant Samuel told them that the police " will lock them up.

" (3) The said defendant Joseph Samuel on the 19th day of " September, 1955, assaulted a person whose name is unknown " who was attempting to enter one of the business places for the " purpose of purchasing therein.

" (4) The said pickets carrying flags and placards with slogans " such as 'Hold the line. The workers' security is challenged' "written thereon attend daily around the said business places "and in a menacing and threatening manner surround and "obstruct persons especially old men and women and children "who attempt to enter the said business places shouting at them "'Hold the line.'

"(5) The defendant Levi Joseph on the morning of the 24th "September, 1955, and other pickets conducted themselves in a "boisterous and disorderly manner marching up and down in "front of the said business places shouting 'Hold the line'— "'Don't buy from this Drug Store, workers must be respected.'

"9. In the alternative the defendants and each of them "wrongfully and maliciously conspired with intent to injure the "plaintiffs to create a nuisance and did in pursuance of their "conspiracy create a nuisance by the continuous shouts and "other noises of the pickets and by obstructing the approaches "to the said business places of the plaintiffs thereby seriously "interfering with the comfort of the plaintiffs and the ordinary "enjoyment of the said premises by them.

"10. By reason of the premises the plaintiffs have suffered "damage—Loss estimated at $500,00 up to this date has thereby "been incurred. The plaintiffs claim against the defendants "and each of them: (1) Damages. (2) An injunction restraining "the defendants their servants and agents from unlawfully watching and besetting the business places of the plaintiffs."

By their defence the appellants denied the alleged conspiracy, and put all the isolated acts of the pickets in issue, and denied that they were the employers of the pickets and that they had authorised or consented to or knew of any improper picketing. They alleged that there was a trade dispute between the Union and the respondents; that the picketing was in furtherance of the dispute and that it was at all times lawful.

1960. June 20, 21, 22. *John Platts-Mills* and *Keith McHale* for the appellants. If it could be shown that the appellants had authorised the wrongful acts and that it was their dominant purpose, then they could be found guilty of conspiracy; but in a matter of conspiracy actual individual proof against each one of them is required. That proof was not attempted; there is no evidence that these appellants made themselves responsible for any act. If there were the relationship of master and servant between the executive committee and the pickets the former might be liable for illicit departure by the latter from the course prescribed. There was, however, no evidence to support the findings of the trial judge that there were other objects in mind other than the predominant object of the furthering by the appellants of their own interests. The judge was wrong in law in holding that the appellants were responsible for the unauthorised acts of the pickets. He never found nuisance—he based himself on conspiracy. It is conceded that if the action had been framed in a different way there might have been a successful result against the pickets themselves. There is no finding of conspiracy to injure, or of malicious intent, and no evidence on which that could be found. To make all the other members of the executive committee in any way responsible when only one of them had been present with the pickets there would have to be a whole volume of evidence. As to the vote for the resolution, see *Denaby and Cadeby Main Collieries (Ltd.)* v. *Yorkshire Miners' Association.*[1]

It would be extraordinary if the picket were not the servant of the union but of the individual members of the executive committee; respondeat superior applies between the union and the picket and not between the individual members of the executive committee and the picket: the *Denaby* case.[1] *J. Lyons & Sons* v. *Wilkins*[2] is not very conclusive. In *J. Lyons & Sons* v. *Wilkins (No. 2)*[3] the individual members actually accepted responsibility for the whole of the acts of the pickets—the explanation may be that, knowing that their society would be responsible in any case, those individuals took the responsibility. Two other cases on this topic are *Conway* v. *Wade*,[4] in which the defendant was personally liable because he personally, without any authority whatever, set in course the train of acts; and a similar position arose in *Allen* v. *Flood.*[5] See also *Quinn* v. *Leathem*,[6] where the defendants were held responsible for their own activities. The proposition for the appellants here—that they were not responsible individually—holds good. The only other way in which it might have been put was to challenge the union by challenging the treasurer and officers, but that was not done.

The pleadings do not show any conspiracy except in paragraph 5, but it is not enough to show that it is calculated to intimidate; there must be shown a definite intention to injure:

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[1] (1906) 22 T.L.R. 543, 545–547.

[2] [1896] 1 Ch. 811, 812, 813, 817, 828; 12 T.L.R. 278, C.A.

[3] [1899] 1 Ch. 255; 15 T.L.R. 128, C.A.

[4] [1909] A.C. 506, 508, 512–513; 25 T.L.R. 779, H.L.

[5] [1898] A.C. 1; 14 T.L.R. 125, H.L.

[6] [1901] A.C. 495, 496, 499, 518; 17 T.L.R. 749, H.L.

Crofter Hand Woven Harris Tweed Co. Ltd. v. *Veitch.*[7] On this question of conspiracy, and whether the appellants are under any personal liability, if the Board were to attach any importance to the position in which Joseph, the organiser, and Samuel, the chief picket, might find themselves if they were sued either together or separately or with the pickets, it would not be this case but a different one, and the Board ought not to assume that such a case would succeed.

There may be a picketing which goes beyond the statutory protection but is not a common law nuisance. The concurrent findings of fact all go to isolated incidents and not to a series of continuous matters, and isolated incidents cannot constitute nuisance; it is necessary to have something of a sustained character.

There existed here a trade dispute between Miss Winter, represented by the union, and the respondents: see *Beetham* v. *Trinidad Cement Ltd.*[8]; the Ordinance in that case is identical with the Trade Unions Act here, and that case should be applied. Here, Miss O'Neal did attend the conciliation meetings. There is no question that Miss Winter is using the union as her agent. A difference arose as soon as the union went to the first meeting. Any dispute did not arise until after Miss Winter had been dismissed, but if "non-employment" could not relate to a past employee it would normally make the whole statute unworkable. Here the only dispute was about the non-employment of Miss Winter who had been an employee. It is conceded by the respondents that she was a "workman": section 2 of the Trade Unions Act, 1939. There is a fuller definition of "workmen" in section 2 of the Trade Disputes (Arbitration and Inquiry) Act, No. 17 of 1939—it is associated legislation with the Trade Unions Act. "'Workmen' includes labourers" in section 2 of the Trade Unions Act of 1939, means that there are persons other than labourers who normally would be workmen.

The findings as to the existence of a trade dispute, and as to the predominant object of the appellants, entitle them in law to the full protection of sections 6 and 7 of the Trade Unions Act, 1939, as amended, and such protection is not taken away by the acts of the individual pickets, for whose acts in excess of the furtherance of the legitimate interests of the union the appellants are not responsible. The appellants do not stand in the relation of master and servant to the pickets and, accordingly, are not liable in law for the illegal acts, if any, committed by the pickets.

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[7] [1942] A.C. 435, 439–440, 444, 461; 58 T.L.R. 125; [1942] 1 All E.R. 142, H.L.

[8] [1960] A.C. 132; [1960] 2 W.L.R. 77; [1960] 1 All E.R. 274, P.C.

McHale following. The whole of the evidence is consistent only with the appellants acting to further the interests of the trade union; there is no evidence of malice, and it is impossible to find them guilty of conspiracy.

J. G. Le Quesne for the respondents. The conspiracy pleaded here was a conspiracy to do an unlawful act—an agreement to watch and beset in a wrongful way. If the conspiracy is to do something unlawful, that by itself is enough, and it is unnecessary to investigate the question of motive—it is not necessary to establish any benevolent object. Detailed instructions were given by this executive committee, and for all practical purposes it was a sovereign body; it resolved on action and itself took action, and its unanimous decision constituted an agreement of the members present to have the respondents' premises picketed. There are concurrent findings of the courts below as to what happened outside those premises, and there was evidence on which those concurrent findings could properly have been reached. There was more than a finding by the trial judge of certain isolated incidents; there was evidence of a course of conduct and evidence of incidents which occurred in the course of that conduct.

As to whether the appellants knew and approved of what was going on, there can be no doubt about Levi Joseph; the evidence makes it quite clear that he not only knew and approved of what the pickets were doing, but was himself largely responsible for it. It constituted unlawful picketing, and is enough to deprive them of the protection of section 7 of the Trade Unions Act, 1939, which is identical with the English section, and only protects pickets for the purpose of peacefully obtaining information or peacefully persuading. Here the picketing was outside the protection of section 7 for three reasons: (i) It was not peaceful. (ii) It was not for the purpose of obtaining or communicating information. The dissemination of false information is not peaceful communication of information within the protection of section 7 (*Ryan* v. *Cooke and Quinn* [9]), and here some of the information communicated was false. (iii) They were not peacefully persuading any person to work or abstain from working; they were trying to persuade them not to go into the respondents' shop. [*Toppin* v. *Feron* [10] was referred to.]

If the picketing falls within section 7, then it is conceded that there can be no question of nuisance. If it is not within the protection of that section, then one has to consider the question according to the ordinary rules of law, and it is submitted that the conduct of which Levi Joseph knew, and for which he was partly responsible, was conduct which constituted a nuisance. It is submitted that those present at the meeting of the executive committee on September 9, 1955, agreed that the picketing should be carried out by means of threats; or, alternatively, that the evidence shows that all the appellants except Richards (the editor of "The Workers' Voice" published by the union) knew from the outset of the picketing that it was being carried out in an unlawful way. From the fact that they apparently did nothing to interfere it should be inferred that they approved of it being carried on in that unlawful way. The Court of Appeal find quite clearly that some unlawful means were adopted by the appellants. What happened here was not within the protection of section 7 and constituted a nuisance within the ordinary rules of the common law. There was evidence of noise and shouting, and interference with the normal shopkeeper's business such as to constitute a nuisance, and these acts, it is submitted, were part of the original agreement between the appellants, or of the agreement to be inferred from their knowledge and approval of what was going on. It is quite clear that nuisance had been pleaded and argued.

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[9] [1938] I.R. 512.

[10] (1909) 43 Ir.L.T. 190, 192.

It was said for the appellants that they could not in any case be held liable because they were not personally involved in any unlawful acts, and in support of that proposition *Conway* v. *Wade*[11] and various other cases were cited in which trade union officials had been found to have committed personally various acts, and it was sought to infer that such officials could not be held liable for acts which they had authorised other people to do. But in *J. Lyons & Sons* v. *Wilkins*[12] it was held that the two members of the executive council who had taken no part in the acts could nevertheless properly be held liable. The answer to the "personal "liability" point is that the unlawful act in this case is the agreement, that is, the conspiracy, and if they were party to that unlawful act, then the fact that the conspiracy was actually put into operation by another hand does not make it any the less true that the appellants were involved in an unlawful act. The mere fact of that agreement was an unlawful act. The judge was justified in finding that directions for this unlawful conduct were given by the appellants.

[11] [1909] A.C. 506.

[12] [1899] 1 Ch. 255, 258.

It was further suggested that the appellants should not be made liable for what happened because, in whatever they did, they were acting on the business of the union, and it was suggested that a representative action could be brought. Section 6, however, in terms forbids representative actions. It appears from *Vacher & Sons Ltd.* v. *London Society of Compositors*[13] that proceedings can be brought against individuals for acts they have done in the course of the union's business.

Alternatively, if the Board are against the main argument for the respondents, it is submitted that agreement sufficient to found a conspiracy has been made out between the appellants Joseph and Samuel, and that the judgment should therefore stand against them: see *per* Viscount Simon L.C. in the *Crofter* case.[14] It is clear that those two appellants agreed that unlawful acts were to be committed.

Lastly, the Court of Appeal were right in finding that there was not a trade dispute. For there to be a trade dispute it is essential to find a dispute between an employer and workman. It is common ground that no dispute existed up to the time when Miss Winter was dismissed; it was after her dismissal that the dispute arose. The parties to the dispute would be the respondents and Miss Winter, but there is no evidence to show that at the time when this dispute arose Miss Winter was a workman. It is not shown that there was a dispute between an employer and a workman. Whether or not there was a trade dispute, however, would not make any difference in the end, because if the respondents are right that there was here an agreement to commit unlawful acts, or, alternatively, that, agreement or no agreement, there were unlawful acts committed for which the appellants are liable, then the existence of a trade dispute will not make any difference.

Platts-Mills in reply. This was still a trade dispute which involved the question of non-employment; applying the ordinary common-sense meaning of "workman," in a difference with her late employer Miss Winter was still a workman. [Reference was made to *National Association of Local Government Officers* v. *Bolton Corporation*.[15]] There is no evidence that any of the appellants had been present at or aware of any of the major points of complaint. If it had been shown that any of them had heard some noise, that still would not make them conspirators; mere knowledge of such acts could not itself be sufficient.

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[13] [1913] A.C. 107, 113; 29 T.L.R. 73, H.L.

[14] [1942] A.C. 435, 441.

[15] [1943] A.C. 166, 184; 59 T.L.R. 1; [1942] 2 All E.R. 425, H.L.

July 26. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts set out above and continued: Evidence was given on both sides as to what took place during the picketing over the period from September 17 to the date of the trial on November 30, 1955, but neither Samuel nor any of the other pickets was called. After referring to the evidence and having remarked on the absence from the witness box of all the pickets the judge said: "Having given careful attention to "these and the other arguments advanced by learned counsel for "the defence, I am, nevertheless, after the fullest consideration "of the evidence of all the witnesses I have had the opportunity "of hearing and observing, of the opinion that the particular "incidents mentioned by me as having been related by Gertrude "O'Neal, Linda O'Neal, Victoria Frederick, Cardigan Stevens "and Iris Barrow did take place, and that their accounts of them "are substantially correct; these persons impressed me as being "essentially truthful witnesses, whatever their feelings towards "the Union."

The Court of Appeal, after referring to the passage cited above, said: "There is abundant material from which the learned "judge could so find and we endorse that finding."

There are, therefore, concurrent findings of fact on this part of the case which clearly establish, when the evidence which the judge accepted is looked at, that intimidation and threats of violence were used to prevent customers from entering the business premises of the respondents to an extent which amounted to an actionable nuisance. How far responsibility for these acts of the pickets can be established against all or some of the appellants will, however, require further consideration.

The trial judge approached this question as follows. He found that the appellants, other than Samuel, had by the resolution of September 9, 1955, agreed to the picketing of the respondents' premises, that the general secretary had appointed the pickets pursuant to the authority conferred on him by the resolution and that the pickets so appointed had used coercion, intimidation and threats of personal violence, that the pickets so appointed were the servants of the appellants who were liable for the acts of their servants. He accordingly held that, although the predominant object of the picketing was the furthering by the appellants of their own interests, they had conspired to achieve their purpose by the use of unlawful means.

Samuel, although he was not a member of the executive committee and had not attended any of its meetings, was held liable as the judge said it was not disputed that he had combined with the other appellants for the purpose of picketing the respondents' premises.

This reasoning cannot be supported.

The pickets were not the servants of the individual appellants. They were appointed by the Antigua Trades and Labour Union, which could, of course, only act by agents who were in this case the executive committee and the general secretary, but this does not create the relationship of master and servant between these persons and the pickets. The general manager or works foreman of an industrial limited liability company may have authority to engage and dismiss workmen and direct their operations, but this does not make the workmen appointed by them their servants.

The Court of Appeal, as previously stated, endorsed the trial judge's findings with regard to the means and methods adopted in the picketing, but were not satisfied that he had made a definite finding that the main purpose of the conspiracy was to further the appellants' legitimate interests and said that they were still less convinced that there was sufficient and satisfactory evidence to support such a conclusion. Having examined the evidence they said: "An examination of the evidence clearly "reveals not only what was the real intention of the appellants "but also the nature of their agreement at the material time, "their external acts and their conduct show that by mutual "consent and acquiescence they had a common purpose, that is, "to cause injury to the respondents and bring them into subjec-"tion by employing means which were manifestly unlawful."

They do not seem to have examined the position of each individual appellant in order to determine whether and, if so, how he had become a party to the unlawful conspiracy. It would therefore appear that they must have approached the question in the same way as the trial judge, i.e., on the basis of the existence of the relationship of master and servant between the individual members of the executive committee and the pickets.

In rejecting any conclusion adverse to the appellants based on the master and servant theory their Lordships must not, however, be understood as saying that a finding of unlawful conspiracy might not have been established against some of the appellants if the courts below had approached the case from a different angle, i.e., by looking to see what part, if any, each appellant had played in connection with each specific incident when threats or intimidation had been used and then considering whether such part necessarily compelled the inference that the particular appellant was party to a conspiracy to use unlawful means to further the object of the picketing and thereby create a nuisance. Their Lordships do not consider it would be proper for them at this stage to undertake such an investigation in the absence of clear and convincing evidence implicating the persons concerned and pointing irresistibly to their participation in an unlawful conspiracy.

Examination of the evidence accepted by both courts below does, however, reveal beyond doubt that the appellants Joseph (the organiser) and Samuel (the chief picket)—apart from any question of conspiracy—were present and actively assisting in the picketing which was being carried out with threats and intimidation so as to obstruct the approaches to the respondents' premises continuously from September 17 to November 26, 1955, thereby constituting a nuisance which has been found to have caused damage to the respondents' trade.

Joseph led the pickets on September 17 when they were first posted and was frequently present thereafter during the period in question. Samuel was present throughout.

On September 17, when the pickets arrived, Joseph was at their head and taking a leading part. He was shouting " Don't " buy from O'Neal's Drug Store " and told the pickets to shout behind the people going into the store. Samuel was present throughout and himself shouted " Don't buy from O'Neal's." One of the pickets (a Dominican named Tilton Theophile) threatened to knock down several persons attempting to enter the store. On September 19 Samuel, who was a special constable, told people they would get into trouble if they went in. September 24 was a particularly noisy day. Some pickets were heard to threaten to beat people if they went in. Joseph was present that day egging on the pickets to shout louder. The respondents telephoned the police to complain. Joseph said he was temporarily substituting for one of the pickets. After a visit from the police Joseph was urging the pickets to shout louder. On October 15 a young woman was surrounded by pickets and entered the store " almost in a state of collapse." On November 11 Samuel said to a customer " Nelson, don't you hear you must " not go in there to buy—you is a dog." On November 26 a Mrs. Allen asked Samuel what was the meaning of the words " Hold the line " (which was a slogan freely used by the pickets throughout this period) and was told it meant that nobody would enter the drug store.

The Court of Appeal, in referring to these matters, said: "In "reality the evidence discloses that on the morning of September "17, 1955, the pickets carrying placards arrived accompanied by "a steel band playing, and a large crowd. The appellant Samuel "was one of the pickets. They were installed around the "premises by the appellant Levi Joseph with much flourish, "fanfare and noise. Thereafter their behaviour was of such a "nature as to intimidate and prevent people from going into the "store and it is clear, as found by the trial judge, methods of "obstruction, coercion, intimidation and threats of personal "violence were used. On occasions the pickets kept up a "continuous shouting for sustained periods to such an extent as "to constitute a nuisance."

Their Lordships are satisfied that the concurrent findings of fact are sufficient to establish the existence of a nuisance which has caused damage to the respondents and that the evidence accepted by the trial judge clearly shows that the appellants Joseph and Samuel are liable as participants with others in the creation and continuance of the nuisance. The statement of claim alleges in the alternative a conspiracy to create a nuisance and the creation thereof pursuant to such conspiracy. Their Lordships do not consider it necessary or desirable to investigate whether the participation of the appellants Joseph and Samuel in the creation of the nuisance was in pursuance of a previous conspiracy or not. It suffices that they are each responsible for the tort in the commission of which they have assisted. They are accordingly liable for the damage which the trial judge has assessed at the sum of £80, and as against them the respondents are entitled to an injunction the terms of which will be indicated later.

It will have been observed that so far no reference has been made to the legislation relating to trade disputes. As there is nothing in the relevant legislation to protect any individual from liability for torts committed by him whether in furtherance of a trade dispute or not it is not strictly necessary to the decision of this appeal to determine certain questions which are of considerable importance to trade unions and employers and which figured prominently in the courts below. But their Lordships consider it is desirable to make some observations thereon.

The relevant statutory provisions are as follows:

Trade Unions Act, 1939.

" *Section* 2. In this Act—

" ' Workmen ' includes labourers.

" ' Trade dispute ' means any dispute or difference " between employers and workmen, or between workmen " and workmen, connected with the employment or non- " employment, or the terms of employment, or with the " conditions of labour, of any person.

. . . . . .

" *Section* 6 (A) (1). . . .

" (2) An act done in pursuance of an agreement or combina- " tion by two or more persons shall, if done in contemplation or " furtherance of a trade dispute, not be actionable unless the act, " if done without any such agreement or combination, would be " actionable.

. . . . . .

" *Section* 7. It shall be lawful for one or more persons, acting " on their own behalf or on behalf of a Trade Union or of an " individual employer or firm in contemplation or furtherance of " a trade dispute, to attend at or near a house or place where a " person resides or works or carries on business or happens to be " if they so attend merely for the purpose of peacefully obtaining " or communicating information or of peacefully persuading any " person to work or abstain from working."

Trade Disputes (Arbitration and Inquiry) Act, 1939.

" *Section* 2 (1). For the purposes of this Act ' trade dispute ' " means any dispute or difference between employers and work- " men, or between workmen and workmen, connected with the " employment or non-employment, or the terms of employment, " or with the conditions of labour, of any person.

" The expression ' workmen ' means any person who has " entered into or works under a contract with an employer " whether the contract be by way of manual labour, clerical " work or otherwise, be expressed or implied, oral or in writing, " and whether it be a contract of service or of apprenticeship or " a contract personally to execute any work or labour.

. . . . . .

" *Section* 8 (1). Where any trade dispute exists or is appre- " hended the Governor may, whether or not the dispute is " reported to him under this Act, inquire into the causes and " circumstances of the dispute and, if he thinks fit, refer any "matter appearing to him to be connected with or relevant to "the dispute to a Board of Inquiry (hereinafter referred to as "'the Board') appointed by him for the purpose of such reference, and the Board shall inquire into the matters referred to "it and report thereon to the Governor."

It was contended by counsel for the respondents at the trial that in order to constitute a trade dispute over a dismissal a dispute or difference must arise between the remaining employees and the employer. In the present case there was no dispute or difference between the remaining employees (none of whom were members of the Union) and the respondents. He also appears to have contended that in any event there can be no trade dispute between a dismissed employee and a dismissing employer if the dismissal was lawful (i.e., if the period of notice required by law is given or payment in lieu thereof made).

The trial judge rejected these submissions. He held that a trade dispute existed and that the predominant object of the picketing was a furthering by the appellants of their own interests, although they had other objects in mind and unlawful means had been used. On appeal the respondents by cross-appeal gave notice that they would contend (1) that the definition of workman in the Trade Unions Act, 1939, does not include clerk, and (2) that the judge was wrong in holding that a trade dispute existed between the respondents and Averyl Winter represented by the Antigua Trades and Labour Union. The Court of Appeal accepted both these contentions and increased the damages from £80 to £100 by reason of the non-existence of a trade dispute. In arriving at these conclusions they held that the only dispute was between the Union and the respondents, basing themselves on certain observations of Bennett J. in the Court of Appeal in *Rex* v. *National Arbitration Tribunal; Ex parte Bolton Corporation.*[1] These observations were, however, not relied upon by the respondents when that case reached the House of Lords,[2] where the decision of the Court of Appeal was reversed and Viscount Simon L.C. in his speech stated that they must be regarded as abandoned.[3] Lord Wright described as "strangely out of date"[4] the argument that a difference between a trade union acting for its members and their employer cannot be a trade dispute.

The Court of Appeal further held that Miss Winter was not a workman. They would appear to have construed the words "workmen includes labourers" in section 2 of the Trade Unions Act, 1939, as amended, as though it were a definition. Although it is true that the definition in the Trade Disputes (Arbitration and Inquiry) Act, 1939, cannot be imported as such into the Trade Unions Act, there is nothing to compel a limited and restricted meaning to the word "workman" in the latter Act. On the contrary, the subject-matter would seem to their Lordships, in the absence of words of limitation, to call for a wide and liberal interpretation which should not exclude shop assistants. With regard to the trial judge's finding that the predominant object of the picketing was the furtherance of the appellants' own interests, their Lordships are unable to agree with the Court of Appeal that this did not amount to a definite finding that the main purpose of the alleged conspiracy was to further the appellants' legitimate interests, nor can they accept the view that the finding was not justified by the evidence. Their Lordships also agree with the trial judge's rejection of the submission that the lawful dismissal of a workman cannot be the subject of a trade dispute.

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[1] [1941] 2 K.B. 405; 57 T.L.R. 644; [1941] 2 All E.R. 800.

[2] [1943] A.C. 166; 59 T.L.R. 1; [1942] 2 All E.R. 425, H.L.

[3] [1943] A.C. 166, 176.

[4] Ibid. 189.

For the reasons previously stated, however, their Lordships will humbly advise Her Majesty that the order of the Court of Appeal be discharged and that the judgment of the trial judge be varied by entering judgment for the respondents for the sum of £80 damages against the appellants Joseph and Samuel only, and that an injunction against the appellants Joseph and Samuel restraining them from creating a nuisance to the respondents by using threats or intimidation or inciting other persons to use threats or intimidation to deter customers from entering the premises of the respondents or otherwise obstructing free access by the public thereto, be substituted for the injunction ordered by the trial judge.

The appellants Joseph and Samuel must pay one-half of the costs in the courts below, excluding the costs of the cross-appeal which must be paid by the respondents, and excluding the costs of joining the appellant Hurst and the costs of and incidental to the two applications for an interim injunction, as to which the trial judge's order will stand.

There will be no order as to costs of the present appeal.

Solicitors: *Robert K. George; Zeffertt, Heard & Morley Lawson.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)* HUDSON'S BAY CO. . . . . . . APPELLANTS;

AND

1959 July 1, 2, 29. THOMPSON (VALUATION OFFICER) . . RESPONDENT.

Rates and Rating—Industrial hereditament—Adapting for sale—Fur sorting and auction premises—Mixed parcels of skins received from individual sellers—Sorted into auction lots of identical grade and species irrespective of ownership—Sold on commission on behalf of sellers — Whether "adapting for sale" — Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1)—*Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

The appellant company's premises were used for the sorting and grading of skins, and their subsequent sale by auction to furriers. About 25 per cent. of the skins belonged to the company, the remainder being consigned by a number of different owners in the form of bales comprising a number of different species and qualities. Before sale the skins were sorted and graded into auction lots suitable for sale, each comprising a number of skins of the same species and quality, a process requiring great skill and experience. Each lot would contain skins which had been consigned by a number of different owners, and were identified throughout, the price bid being so much per skin, and the proceeds being credited to the respective owners. The company contended that this operation constituted an "adapting for sale" of the skins, so that their premises constituted a "workshop" within the meaning of section 149 of the Factory and Workshop Act, 1901, with the consequence that they qualified as an "industrial hereditament" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.[1]

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament . . . occupied and used . . . "subject as hereinafter provided, as "a factory or workshop: Provided "that the expression industrial "hereditament does not include a "hereditament occupied and used as "a factory or workshop if it is "primarily occupied and used for the "following purposes or for any combination of such purposes, that is to "say— . . . (c) the purposes of distributive wholesale business; (d) "purposes of storage; . . . (f) any "other purposes . . . which are not "those of a factory or workshop. "(2) . . . save as aforesaid, the "expressions 'factory' and 'work"'shop' have respectively the same "meanings as in the Factory and "Workshop Acts, 1901 to 1920. . . ."

Factory and Workshop Act, 1901, s. 149: ". . . The expression 'work"'shop' means— . . . (b) any "premises, room, or place, not being "a factory, in which . . . any manual "labour is exercised by way of trade

The Lands Tribunal and the Court of Appeal held that the premises did not qualify as an industrial hereditament. On appeal:—

Held, (1) that for the purposes of section 149 of the Factories and Workshop Act, 1901, the "article" in question was a single lot and not a single skin, and that the grading and sorting of the skins into individual lots constituted an "adapting for sale" of such "article" within the meaning of the section.

Dictum of Viscount Dunedin in *Grove* v. *Lloyds British Testing Co. Ltd.* [1931] A.C. 450, 467; 47 T.L.R. 308 considered.

But, (2) that as there had been no finding by the Lands Tribunal as to whether any manual labour was exercised for the purpose of such adapting for sale, the case must be remitted to the tribunal for determination of that question.

Decision of the Court of Appeal [1958] 1 W.L.R. 955; [1958] 3 All E.R. 243 reversed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal (Jenkins, Parker and Pearce L.JJ.), dated July 25, 1958, dismissing an appeal by the appellant ratepayers, the Hudson's Bay Co., by way of case stated from a decision of the Lands Tribunal (Sir William Fitzgerald Q.C., President), dated October 2, 1957, who had dismissed an appeal by the appellants from a decision of the Central London Local Valuation Court dated October 3, 1956.

The question raised by this appeal was whether the hereditament occupied by the appellants and described in the rating valuation list as "Warehouses, Offices and Cold Stores, Great "Trinity Lane, 26–30, Little Trinity Lane, 1–13, Garlick Hill, "1–6, Sugar Loaf Court, 'Beaver House,'" was an "industrial "hereditament" as defined by section 3 of the Rating and Valuation (Apportionment) Act, 1928. The answer to this question turned on whether or not the activities carried on by the appellants at the said hereditament amounted to "the "adapting for sale" of any article within the meaning of the definition of "workshop" contained in section 149 (1) of the Factory and Workshop Act, 1901. The Local Valuation Court, the Lands Tribunal and the Court of Appeal had held that the said hereditament was not an "industrial hereditament."

The facts were set out in the decision of the Lands Tribunal

"or for purposes of gain in or incident to any of the following purposes, namely—(i) the making of "any article or of part of any article; "or (ii) the altering, repairing, "ornamenting, or finishing of any "article; or (iii) the adapting for "sale of any article . . ."

H. L. (E.)

1959

HUDSON'S BAY CO. v. THOMPSON.

annexed to the case stated and amplified in the latter. Reference was made in those documents to "Beaver Hall" and the carpenter's workshop, as to which no question arose on the appeal.

The decision of the tribunal read as follows: "The essential "facts are these. Beaver House and Beaver Hall were both "built about 1925 to 1927 by the company: the workshop is "considerably older. An agreed site plan was tendered. On "that site plan Beaver House is coloured pink, Beaver Hall "green, and the carpenter's workshop blue. All these properties "have common walls and common services, but there is no "actual intercommunication between them. Since 1940 the "company's headquarters were at Bishopsgate, but in that year "their headquarter administration moved into Beaver House: "the object of the move being to get proper accommodation "in the heart of the fur trade area centred on Garlick Hill. "Beaver Hall is commonly known as the 'Fur Trade Sale "'Room.' The sales that are conducted in the hall are run "by a committee which is known as the Committee of London "Public Fur Sales. This committee operates under an agree-"ment of 1957 made between the Hudson's Bay Co. and certain "other companies and partnerships and it recites that the "objects of the committee are the holding of public sales of "furs upon the premises and their regulation, management and "control as between members of all such sales. The enforce-"ment and performance of rules are set out in the second "schedule. It provides that the committee shall in its absolute "and exclusive discretion manage and control all public sales "of furs held on the premises and shall permit sales of furs "by auction to be held on the premises on convenient days and "at convenient hours. The general effect of the agreement is "that the main function of Beaver Hall is concerned with the "holding of fur sales. Its control and management have been "given to this committee in which is vested entire management "of such sales, and which can decide when such sales are to take "place and how many there shall be, and although the Hudson's "Bay Co. remain the owners and normally the occupiers, the "committee is the de facto body in running the fur sales. "There is another agreement relating to Beaver Hall which "concerns a company known as the Little Ship Club. This "provides that the two rooms lying at the south end of the "entrance hall, and the two small store-rooms, shall be avail-"able for the club all the year round. Another part of Beaver

" Hall is known as the Strathcona Room, which is let for " 'company, public and society meetings, trade exhibitions, " 'dances, etc.' "

The decision went on to describe the use to which Beaver Hall was put, and by way of introduction stated the company's contention to be that Beaver House was primarily occupied and used by the company for the sorting and grading of furs; that by means of that sorting and grading bales of unsorted and ungraded skins sent in by trappers and breeders from various parts of the world were changed into saleable lots of assorted and graded skins.

The decision continued: " It may be said, therefore, that the " real issue upon which this case will depend is whether what is " done to those skins is or is not adapting for sale within the " meaning of the Factory Act. Mr. Rowe, with his usual " candour, has admitted that if it is not an adapting for sale " then he cannot see how he can win. The total area of Beaver " House amounts to some 114,000 sq. ft. in round figures. The " company's headquarter administrative offices occupy some " 4,253 sq. ft. and the basement part of the premises, occupying " some 17,873 sq. ft., are used during the summer months for " the storage of furs for private owners. At this point it may be " convenient to describe in detail the various processes carried " on at Beaver House from the arrival of the fur skins to their " disposal at the auction held in the auction room there. Bales " of skins are addressed from almost all parts of the world except " the Soviet Union. They arrive in lorries at the reception basement. There they are unloaded on to lifts and conveyed to " the first floor where the bales are opened and are sorted " according to types—the bales consist of mixed skins of various " animals. The sorted bundles are then passed up to the next " floor; some of the skins which may be dusty or gritty are put " in drums with clean sawdust and whirled round. This " eliminates the dust and grit. This process is necessary only " in the case of very few, indeed almost a negligible quantity of " the skins that come in. Next comes the process on which the " appellants mainly rely to establish their contention that there " is an adaptation for sale. The skins are passed along in trolleys " to the sorters' counters. The counters extend along the room " which is specially lighted with artificial light and large windows. " The sorters are men who have been specially trained in the art " of sorting. It is said that it takes about ten years to make a " man an entirely efficient sorter. The sorter takes the skin and

" grades it either by its feel or visual appearance. Immediately " behind the sorter is a trolley with various shelves. Each shelf " represents the class which the sorter assigns to the skin. These " grades of skin are then conveyed to another sorting room where " there are sorters who can be described as final specialists. " These sorters examine the skins and either confirm the grading " or up- or down-grade the skins again. After this final grading " the skins are catalogued and passed down to the display room. " There they are displayed for some days and prospective buyers " come along to examine them and bid for them at the auctions " which are held about three times yearly. The skins are still " in a raw state in the sense that they could not be used as furs. " They have to undergo a highly technical process which converts " them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who " buy the skins at the auction."

In the case stated the facts were thus amplified: " 3. At the " hearing before me the facts, which were proved or admitted, " and the contentions put forward by the parties, are contained " in my decision, a signed copy of which is annexed hereto and " forms part of this case, save that the following further facts " were admitted although not referred to in my decision: " (a) The carpenter's workshop is used exclusively for purposes " connected with Beaver House and Beaver Hall, namely, the " making and repairing of things for use on those premises, and " the storing of furniture surplus to the current requirements of " those premises; (b) very approximately 25 per cent. of the " skins coming into Beaver House are owned by the appellant " company and 75 per cent. are owned by other persons; but " these are variable figures; (c) each skin (except musquash) is " labelled on arrival in Beaver House with the object of making " that skin identifiable as the property of a particular customer " at all stages. Large numbers of musquash are dealt with but " their value is small, both individually and collectively, in " relation to the appellant company's turnover. Usually one " bale of musquash will provide one or two satisfactory lots, and " the identity of these lots can be preserved without individual " ticketing; (d) some furs are sold by private treaty in Beaver " House; nobody comes to buy furs at the auctions except with " a view to resale, and the Committee of London Public Fur " Sales does not regard a private individual as an authorised " trader."

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J. Ramsay Willis Q.C. and *W. L. Roots Q.C.* for the appellants. The processes carried on by the appellant company in Beaver House amount in law to an adapting of these articles for sale. The skins come into Beaver House in bulk and go out as a different bulk. The important matter, however, is what is done to the skins on the hereditament. This case falls within the well-known passage in the dissenting judgment of Lord Sands in *Inland Revenue Commissioners* v. *Easson Brothers*,[2] which was approved by the House of Lords in *Kaye* v. *Burrows* [3] and *Hines* v. *Eastern Counties Farmers' Co-operative Association*.[4] It is wrong to apply by analogy the principle of *Grove* v. *Lloyds British Testing Co. Ltd.*[5] to the facts of the present case. *Grove's* case [6] is a very special case, for there the hereditament was used solely for testing the article in question: see *Acton Borough Council* v. *West Middlesex Assessment Committee*.[7] Reliance is also placed on *Richardson (A.) & Son* v. *Middlesbrough Borough Assessment Committee* [8] and *Valuation Commissioner* v. *McAllister*.[9] The example given by Evershed M.R. in *Davis Cohen & Sons Ltd.* v. *Hall* [10] as to what he considered would not be an adapting for sale, namely, the sorting out of 25,000 pairs of boots all mingled together, is plainly distinguishable, for that would not be a "bulk" case and, further, it plainly postulates that the work would be done by unskilled labour. In all cases of this kind it is a question of degree whether there has been an adapting for sale, and prima facie it is one of fact: *Cockram* v. *Tropical Preservation Co. Ltd.*[11]

In the present case the question of the ownership of the individual skins is irrelevant in considering whether the operations or processes carried on upon the premises amount to an adapting for sale. Attention is drawn to the following relevant facts: (1) The processes of sorting, matching and grading skins all require the use of very great skill and are highly technical. (2) The processes are applied to skins which before the start of operations would only command a very low price but which, by the time they are graded, command a market price. (3) The purpose of grading is to obtain the best price for each individual skin by putting it with other skins of equivalent value. (4) The skin on its arrival at the hereditament has a potential value which cannot be realised for the skin as a skin or the bulk as a bulk, and the intention is to mix the skin with other skins from other consignments as soon as the necessary grading has taken place. Identification of a skin has nothing to do with the adapting for sale. (5) By grading the potential value is realised, but only so long as the skin is in association with other skins. (6) The object of the sorting and grading process is to produce bundles of skins suitable as lots in an auction sale of furs. (7) In so far as it was not a fact before the Court of Appeal, it is a fact now accepted that, after the lotting is completed and before the furs either in sample or lots are put on display, there is no tagging except in the case of mink.

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[2] 1930 S.C. 480, 485.

[3] [1931] A.C. 454, 477, 481–484.

[4] [1931] A.C. 456, 477, 481–484.

[5] [1931] A.C. 450, 466.

[6] Ibid.

[7] [1949] 2 K.B. 10, 13, 15.

[8] [1947] K.B. 958; 63 T.L.R. 413; [1947] 1 All E.R. 884.

[9] [1954] N.I. 54.

[10] [1952] 1 All E.R. 157, 159.

[11] [1951] 2 K.B. 827, 833, 835, 839, 841; [1951] 2 T.L.R. 814; [1951] 2 All E.R. 520.

The point ultimately is whether or not the article to be sold must on the facts be deemed to consist of each individual skin belonging to each intending vendor. It is emphasised that after lotting, except in the case of mink, it is impossible to identify any individual skin in a lot, since its identity is submerged in the lot. All that a vendor knows is that a skin belonging to him is in a particular lot. The whole system at Beaver House is directed to submerging the identity of the skins. The question whether or not these premises are entitled to be derated cannot depend on whether all the skins before processing belong to the appellants or to the numerous individual owners.

[Reference was also made to *Bailey* v. *Potteries Electric Traction Co.*[12]; *Kaye* (*Dewsbury Revenue Officer*) v. *Burrows*[13]; *Jobling* (*James A.*) *& Co. Ltd.* v. *Sunderland County Borough Assessment Committee*[14] and *East Kent Packers Ltd.* v. *Buncombe.*[15]]

J. P. Widgery Q.C. and *J. Raymond Phillips* for the respondent valuation officer. A ratepayer who seeks to claim "derating" for his premises must answer four questions to the satisfaction of the rating authority: (1) What is the article? (2) What are the processes which are applied to it? (3) Do these processes make the article different in itself? (4) Are the processes directed to making it saleable or more readily saleable?

As to (1) (supra), the appellants contend that they adapt an article for sale; in such a case the article must be identifiable at every stage of the process carried on in the hereditament. In all the "bulk" cases it has been put that what comes into the hereditament are, for example, rags, apples, eggs or seeds in bulk, and what goes out are rags, apples, eggs or seeds in bulk. Suppose at the beginning of a week there come into a factory 20 tons of mixed rags and during that week there are 20 tons of rags processed. At the end of the week there go out 20 tons of rags; it is submitted that those rags in bulk constitute one article. The articles in the present case neither come into the hereditament as a bulk nor go out as a bulk. The following observations of Jenkins L.J.,[16] delivering the judgment of the Court of Appeal, are adopted: "It is of the essence of the 'bulk' principle that the "components of the bulk should lose their identity in the bulk, "so that the bulk and not its individual components can properly "be regarded as the article to be sold."

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[12] [1931] 1 K.B. 385, 492–495 (C.A.).

[13] [1931] 1 K.B. 386, 508.

[14] [1944] W.N. 126; 60 T.L.R. 330; [1944] 1 All E.R. 500 (C.A.).

[15] (1951) 45 R. & I.T. 151.

The seed cases are a typical example of the bulk principle. In the present case the article is the individual skin; the Lands Tribunal so held and there is evidence to support the President's finding. There is a plain distinction between a ton of seed where each seed has lost its identity, and 20 skins which are easily identifiable. The skins, since they come in labelled, do not come in as a bulk. On this branch of the argument it is proposed to consider separately the cases of mink and Persian lamb. As to mink, (1) the skins remain throughout the processing the property of the individual consignors; (2) the purchase price is expressed by the buyer in terms of so much per skin. The ownership in the skins is not affected by the process of sorting, grading and lotting. When a lot is sold, at the moment before the auctioneer drops his hammer there exist a number of owners of individual skins, and on the fall of the hammer there comes into existence a series of contracts made simultaneously with the several owners of the skins. There is a segregation of those skins and an absence of bulk until the hammer falls. The "article" which is being sold is the individual contribution of each owner. The present case is analogous to that of the case of two antique candlesticks, which are of little value individually. A dealer buys one for a small sum, he knowing where he can buy the other, which he does. Subsequently he sells the pair for a large sum of money. It cannot be seriously suggested in these circumstances that the matching of the candlesticks amounts to an "adapting for sale." As to *Persian lamb*, it is submitted that the ownership of the skins is not affected by the removal of the labels. Generally, it is to be noted that none of the " bulk " cases deal with articles as valuable as the skins in question here.

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[16] [1958] 1 W.L.R. 955, 973.

If it be held that the " articles " here are skins in bulk, then it is necessary to determine the other questions which the Court of Appeal did not consider.

Question (2) (supra) is not in dispute.

As to question (3), Viscount Dunedin's dictum in *Grove's* case,[17] that " ' adapting for sale ' points clearly to something " being done to the article in question which, in some way, makes " it in itself a little different from what it was before," is of general application. It was the test adopted by the Court of Appeal in *Cockram* v. *Tropical Preservation Co.*[18] and in *Davis Cohen & Sons Ltd.* v. *Hall.*[19] Value obtained by association is the opposite of obtaining an increase in value by adapting for sale. Putting an article with other articles in order to increase its value is not an adapting for sale. To constitute an adapting for sale there has at least to be (a) some small change in the article, and (b) that change must be brought about by a process which is of some complexity. The process in *Fullers Ltd.* v. *Squire*[20] amounted to an adapting for sale, since the quantities of unpacked sweetmeats, with which the operation commenced, finished up in a different form, namely, as boxes of chocolates.

It is emphasised that the " article " for present purposes is an individual skin; auction by lots is for the convenience of the customer, and the real nature of the transaction is no different from sales over the counter. A mere rearrangement of articles does not constitute an adapting for sale even though the rearrangement facilitates their subsequent sale. But where such rearrangement is the result of a complicated and mechanical process, or where the process is complicated and substantial, it amounts to an adapting for sale: see *per* Scrutton L.J. in *Bailey's* case.[21] The test to be applied to determine whether the hereditament is a " workshop " within section 149 of the Factory and Workshop Act, 1901, is: is the process of adapting for sale carried on therein a manufacturing process? In this connection the part played by skill in such a process is not dwelt on in the authorities; it is not mentioned in Scrutton L.J.'s observations in *Bailey's* case,[22] and is but obliquely referred to in *Davis*

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[17] [1931] A.C. 450, 467.
[18] [1951] 2 K.B. 827.
[19] [1952] 1 All E.R. 157.
[20] [1901] 2 K.B. 209.
[21] [1931] 1 K.B. 388, 494, 495.
[22] Ibid.

Cohen & Sons Ltd. v. *Hall.*[23] Skill is not a relevant factor, because the more skill that is used the less likelihood is there that manual labour is used and, therefore, the less likelihood of it being a factory process. It is in every case a question of fact and degree whether the process is of a manufacturing nature or is complicated and substantial. In so far as it may be necessary to do so to support the above contentions, it is contended that *Davis Cohen & Sons Ltd.* v. *Hall*[24] was wrongly decided and should be overruled.

As to question (4) (supra), that has been impliedly answered in dealing with the other questions.

In conclusion, it is submitted that the process carried on in Beaver House was a prelude to distribution of the articles in question and was not a manufacturing or finishing process. There is ample evidence to support the President's findings, and his decision thereon should not be disturbed.

[Reference was also made to *Kaye* v. *Burrows*[25]; *Richardson (A.) & Son* v. *Middlesbrough Borough Assessment Committee*[26] and *Jobling (James A.) & Co. Ltd.* v. *Sunderland County Borough Assessment Committee.*[27]]

If the House rejects the respondent's contention on the question of adapting for sale, then it is submitted the case should be remitted to the tribunal to determine whether manual labour was exercised in the process.

Ramsay Willis Q.C. in reply. The essential and crucial fact of this case is that something happened to the skins between the time they arrived at Beaver House in an unsaleable condition and when they left it in a state in which they could be sold. It is a change of that nature which is the foundation of the bulk cases relating to sorting: see *per* Scrutton L.J. in *Bailey's* case.[28] The suggestion that there must be the same bulk coming out of the hereditament as went into it does not meet the point of principle adumbrated in *Bailey's* case,[29] where, inter alia, Scrutton L.J. contemplates a bulk of smaller size and different character going out. That principle is applied in all the bulk cases: see, for example, *Valuation Commissioner* v. *McAllister*,[30] the ratio decidendi of which is that by the application of the process of testing, grading, stamping and packing, the eggs were impressed

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[23] [1952] 1 All E.R. 157.

[24] Ibid.

[25] [1931] A.C. 454, 477.

[26] [1947] K.B. 958, 962.

[27] [1944] W.N. 126; 60 T.L.R. 330.

[28] [1931] 1 K.B. 388, 492–495.

[29] [1931] 1 K.B. 388, 495.

[30] [1954] N.I. 54, 63, 64.

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with the characteristic of saleability which they did not have before that process was applied to them. It is that characteristic of saleability which is the foundation of Scrutton L.J.'s observations: see also *per* Viscount Dunedin in *Kaye* v. *Burrows*.[31] Applying that test here, the finished article, which is sold, is the lot of finished and graded skins. It would be an abuse of language to describe that as a process carried out merely for the convenience of the buyer or as a mere arrangement of the skins.

The use of the phrase "manufacturing process" does not limit the process of adapting for sale, for in the context of section 149 of the Factory and Workshop Act, 1901, it includes the *making*, *altering* or *adapting* for sale of any article.

The question of the ownership of the skins is entirely irrelevant in considering whether the process is an adapting for sale, and cannot be the determining factor as to whether or not these premises are entitled to be derated.

As to the question of manual labour, this consisted of the manhandling of the skins by the porters, and then by the sorters, the matching of the skins and the putting up of the skins into lots for the purposes of cataloguing. It is plain that manual labour was involved in this process.

It was said that the more skilled was the process in question the less likely was it to be a factory process. So far as the findings of the tribunal and the Court of Appeal are concerned, it is submitted that they have virtually found against the respondent on this part of the argument.

[Reference was also made to *Davis Cohen & Sons Ltd.* v. *Hall*.[32]]

Their Lordships took time for consideration.

July 29. VISCOUNT SIMONDS. My Lords, this appeal from an order of the Court of Appeal affirming a decision of the Lands Tribunal upon an appeal from the Central London Local Valuation Court raises the question whether a certain hereditament in the city of London occupied by the appellants, the Hudson's Bay Company, is "an industrial hereditament" as defined by section 3 of the Rating and Valuation (Apportionment) Act, 1928. It is common ground between the parties that it is such a hereditament if, and only if, it is a workshop as defined by section 149 of the Factory and Workshop Act, 1901, the relevant part of which I set out:

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[31] [1931] A.C. 477, 483, 484.

[32] [1952] 1 All E.R. 157.

"The expression 'workshop' means— . . . (*b*) any premises "room or place, not being a factory, in which premises room or "place . . . any manual labour is exercised by way of trade or "for purposes of gain in or incidental to any of the following "purposes, namely: . . . (iii) the adapting for sale of any "article, and to or over which premises room or place the "employer of the persons working therein has the right of "access or control."

The question therefore involves two considerations, first, whether upon the hereditament in question any manual labour is exercised in the manner indicated in the section and, secondly, whether it is exercised for the purpose of adapting any article for sale. Unfortunately, the first of these considerations has been lost sight of in the course of the case and their Lordships have therefore found it impossible to dispose finally of the matter. They have, however, found it possible to deal conclusively with the second and perhaps more difficult question, viz., whether the activities of the appellants, whether or not they can properly be called manual labour, were exercised for the purpose of adapting an article for sale.

The case came before the Court of Appeal upon case stated by the Lands Tribunal at the request of the appellants, the question upon which the decision of the court was desired being whether there was any evidence upon which the tribunal could make the findings of fact set out in paragraph 5 of the case and whether upon those findings it came to a correct decision in law. It will be remembered that under section 3 of the Lands Tribunal Act, 1949, the decision of the tribunal is final except that any person being aggrieved by the decision as being erroneous in point of law may require the tribunal to sign and state a case for the decision of the court. The contention of the appellants was that there was no evidence upon which the tribunal could make the said findings of fact to support their decision that the hereditament in question was not an "industrial hereditament" and that upon the facts set out in the case and the annexures thereto it was in law an "industrial hereditament."

The materials before the court were not only the case stated, to which as a separate document was appended the lengthy decision of the tribunal, itself containing a further statement of facts, but also the oral and other evidence which had been before the tribunal. In view of the form of question and the contention of the appellants no other course was open, but it involves a detailed consideration of facts which is not altogether appropriate to the procedure by way of case stated. I will be as brief as I can, but I see no alternative to setting out the facts first as set out in the formal case, then as supplemented in the decision and finally as explained or amplified in the evidence.

The hereditament in question is described as Warehouse Offices, and Cold Store, Great Trinity Lane, 26–30, Little Trinity Lane, 1–13, Garlick Hill, and 1–6, Sugar Loaf Court "Beaver "House," and is entered in Part I of the Valuation List for the Rating Area of the City of London at gross value £15,848 and rateable value £13,178. Your Lordships are not concerned with the question which was at one time raised, whether the hereditament which in fact consists of three parts, known as Beaver Hall, the carpenter's workshop and Beaver House, should be assessed as three separate hereditaments. The sole question is whether the activities carried on at Beaver House are such as to constitute it an industrial hereditament. If they are, the necessary adjustment and apportionment of the rate must be made.

The question in the case refers specifically to the findings in paragraph 5 thereof and I cannot fairly abbreviate them. They are as follows:

"5. I am informed that the appellants desire to contend that "there was in point of law no evidence to support my findings of "fact set out hereunder:

"(A) 'I put it this way—without the sorting and grading the "'buyer, unless he were himself an expert, would be taking a "'risk but the skins are still saleable . . . the conclusion I have "'come to is that the only effect of the sorting and grading was "'to certify that the skins were of such a quality as to merit "'being placed in the category in which they appear in the "'auction catalogue.'

"(B) 'What is emptied out of the bales that come into the "'Hudson's Bay Company is not a huge amorphous mass. It is "'a bundle of easily identifiable individual skins. They are sent "'in bundles merely for the convenience of dispatch. It is not "'like the rag case or the seed case in that it is not what has "'come to be known as a "bulk" case at all. It is not the "'intention that the skins should be made into a bulk and sold "'as a bulk. Each skin is sent to the Hudson's Bay Company "'to be sold as a skin, in fact the owner might send only one "'skin although admittedly this would be unusual. It is also "'bought as a single skin although the bidder bids for a lot that

" 'are matched. In a word selling in lots is only for the convenience of the buyer.'

" (C) 'All that has been done here was to arrange the skins.

" 'In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale.' "

At an earlier stage the tribunal had referred to certain additional facts which were admitted though not referred to in its decision. They were (so far as now material) (1) that very approximately 25 per cent. of the skins coming into Beaver House are owned by the appellants and 75 per cent. by other persons (but these are very variable figures); (2) that each skin (except musquash) is labelled on arrival at Beaver House with the object of making that skin identifiable as the property of a particular customer at all stages, that large numbers of musquash are dealt with but their value is small both individually and collectively in relation to the appellants' turnover, usually one bale of musquash providing one or two satisfactory lots, the identity of which can be preserved without ticketing; (3) that some furs are sold by private treaty at Beaver House; and (4) that no one buys furs at the auctions except with a view to resale and the Committee of London Public Fur Sales does not regard a private individual as an authorised trader. It appeared at the hearing before your Lordships that the facts admitted under (2) as to identification were not strictly accurate but I do not think anything turns upon this.

I must next at the risk of some repetition state some of the further facts as found in the decision of the tribunal which forms part of the case. It is necessary to refer only briefly to that part of the hereditament known as Beaver Hall. It is there that auction sales of fur are carried on under the conduct of a committee known as the Committee of London Public Fur Sales which operate under an agreement made between the appellants and certain other companies and partnerships. Nor need I mention further the carpenter's shop. It is upon the activities carried on in Beaver House that the issue turns. They are described by the tribunal as follows:

" Bales of skins are addressed from almost all parts of the "world except the Soviet Union. They arrive in lorries at the "reception basement. There they are unloaded onto lifts and "conveyed to the first floor where the bales are opened and are "sorted according to types—the bales consist of mixed skins of "various animals. The sorted bundles are then passed up to the "next floor, some of the skins which may be dusty or gritty are "put in drums with clean sawdust and whirled round. This "eliminates the dust and grit. This process is necessary only "in the case of very few, indeed almost a negligible quantity of "the skins that come in. Next comes the process on which the "appellants mainly rely to establish their contention that there "is an adaptation for sale. The skins are passed along in trolleys "to the sorters' counters. The counters extend along the room "which is especially lighted with artificial light and large "windows. The sorters are men who have been specially "trained in the art of sorting. It is said that it takes about ten "years to make a man an entirely efficient sorter. The sorter "takes the skin and grades it either by its feel or visual appearance. Immediately behind the sorter is a trolley with various "shelves. Each shelf represents the class which the sorter "assigns to the skin. These grades of skin are then conveyed "to another sorting room where there are sorters who can be "described as final specialists. These sorters examine the skins "and either confirm the grading or up- or down-grade the skins "again. After this final grading the skins are catalogued and "passed down to the display room. There they are displayed "for some days and prospective buyers come along to examine "them and bid for them at the auctions which are held about "three times yearly.

"The skins are still in a raw state in the sense that they could "not be used as furs. They have to undergo a highly technical "process which converts them from skins into saleable furs. "This process is not undertaken at Beaver House. It is carried "out by the furriers who buy the skins at the auction."

Upon these findings the tribunal came to the conclusion after a consideration of certain cases to which I must refer that "the only effect of the sorting and grading was to certify that "the skins were of such a quality as to merit being placed in the "category in which they appear in the auction catalogue." The tribunal further held (distinguishing cases called "the seed case" and "the rag case" which I must examine) that the bales of skins that come to the appellants are bundles of easily identifiable individual skins, being sent in bundles merely for the convenience

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of dispatch, that it is not the intention that the skins should be made into a " bulk " and sold as a bulk, that each skin is sent to the appellants to be sold as a skin—in fact the owner might send only one skin, although admittedly this would be unusual—that it is also bought as a single skin, although the bidder bids for a lot of skins that are matched, in a word that selling in lots is only for the convenience of the buyer. I conclude my reference to the decision of the tribunal by citing its penultimate paragraph: " In my view the process carried on in Beaver House, " highly technical as I concede it is, is merely an identification " of skins and their arrangement in price classes for sale. " Nothing has been done to any skin which in any way makes " it a little different to what it was before—I ignore the cleaning " of the skins in the drum because it applied to a negligible " number of the skins dealt with in Beaver House. There has " therefore been no adapting for sale."

Before I examine the conclusions of the tribunal, which were in effect adopted by the Court of Appeal, I must refer to some further facts which appeared plainly from the evidence and were relied on by the appellants. The furs, which are sent to the appellants from a great many countries in the world, are sent " to be graded and presented to the fur trade in such a manner " as to command for them, the producers, the best possible " market price. They enjoy the careful . . . handling of the " furs to suit the requirements of various fur purchasers all over " the world, which is such that the producer will get a great deal " more money for his goods than if he sold his merchandise in " an unassorted condition." The bales of fur do not always have the same sort of fur. For instance, a bale from Canada will contain practically every kind of wild fur, and even where a bale consists predominantly of one type of fur, e.g., of mink or Persian lamb, there would be a great variety in the type. There are, for instance, 250 recognised main grades and 880 sub-grades of Persian lamb, and in a single bundle of the same type from a consignor there would be a large number of different grades. Thus the components of one bale when sorted and graded would find their place in a number of different lots in which they would be matched with skins coming from a number of other bales. It may be emphasised that the job of sorting, grading and matching is a highly skilled one, the top sorters being paid a basic wage up to £12 2s. 0d. In the result an individual skin arrives in a bale which has to be sorted and graded as described: it goes out in a lot consisting of a bundle of evenly matched similar skins. By this means it realises a price which it otherwise could by no means have realised. I think it desirable to set out certain questions put to the appellants' witness, Mr. Frayling, in cross-examination and his answers:

"Q. From the moment you receive the skins to the moment "you sell them, would it be fair to say the object of what you "do is to achieve the best possible sale price for each individual "skin? A. Most certainly. Q. That is what you are trying to "do? A. Exactly what we are trying to do, yes. Q. As you "indicated yesterday, the skin may vary enormously in value in "one consignment. Your job is to try and get the best price, "skin per skin? A. Yes, by means of putting them with skins "of equivalent value. Q. And the way you do that is, whether "the skin is good or bad in itself, you sell it to the greatest "advantage by selling in company with other skins as near as "possible identical with it? A. That is the object of the process "putting like and like together."

I set out these questions and answers at length because it appears to me that a misunderstanding of them has been the vital factor in leading the tribunal and the court to a wrong decision. For though no doubt it was possible to know how many of a lot of (say) 100 mink skins had been consigned by a particular consignor and perhaps also to know, though this was not wholly clear, which of those skins had been consigned by that consignor, the price paid at an auction for that lot was a lump sum which was apportioned among the several consignors according to the number of skins consigned by them respectively which were in that lot. The skins were not sold skin by skin, though they were sold in a lot at a price per skin. If they had been sold skin by skin, they would not have realised a comparable price. In fact the whole object of the process was to get a price which could not be got by individual sales. It is therefore, in my opinion, wholly unrealistic to treat as the article which has to be adapted for sale a single mink skin which has arrived in a bale with other skins, whether of mink or other animals. This is, to my mind, the decisive consideration in the case. For it might well be that, if one regards each skin as a single unit arriving at and departing from the premises, it would be difficult to say in the words of Lord Dunedin in *Grove's* case [1] that anything is done to it upon the premises "which in some way makes it in itself a little "different from what it was before." It is, I think, just because this is what I have called an unrealistic way of looking at such a transaction that a principle has been established which in my opinion governs the present case. It is that where the process can fairly be regarded as a dealing with a collection or agglomeration of single things, then the scope for adaptation for sale may be wider—I here use the language of Lord MacDermott in his very valuable judgment in *Valuation Commissioner* v. *McAllister.*[2] That learned judge there decided that premises to which eggs are delivered in bulk for the purposes of testing, grading, stamping and packing are premises used for the purpose of adapting articles for sale and therefore are industrial hereditament within the meaning of the Northern Ireland Act. He had already expressed the opinion that, if in the words of the section the "adapting "for sale of any article" means the adapting for sale of each egg, there had been no such adaptation, but was able to come to a conclusion which I would say plainly accords with the common sense of the matter, viz., that the premises were used not for the receipt of single eggs and their subsequent sale egg by egg but for the receipt of a collection of eggs in crates and their subsequent sale in lots which, since they had undergone the process of testing, grading, stamping and packing, differed widely from the original collection. He held in effect that the "article" in such a case is the collection and that it is that to which one must look to see whether there has been adaptation for sale. If so, the process to which the collection of eggs was subjected was an adaptation for sale. In coming to this conclusion the learned Lord Chief Justice was amply supported by the authorities that he cited to some of which I will refer. In doing so I find myself adopting much that he has said.

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[1] [1931] A.C. 450, 467; 47 T.L.R. 308.

My Lords, it appears to me upon an examination of the facts in the present case that there is as little justification for regarding a single skin as the article whose adaptation for sale is required as there was in *McAllister's* case [3] for so regarding a single egg, or in *Burrows'* case [4] for so regarding a single rag, or in *Hines'* case [5] for so regarding a single seed. The words of Scrutton L.J. in the seed case,[6] cited with approval by Lord Dunedin,[7] are precisely apposite: "In my view, there was both alteration of

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[2] [1954] N.I. 54.

[3] Ibid.

[4] [1931] A.C. 454, 477; 47 T.L.R. 308.

[5] [1931] A.C. 456, 477; 47 T.L.R. 308.

[6] [1931] 1 K.B. 446, 504; 46 T.L.R. 601.

[7] [1931] A.C. 477, 483.

" substance and adapting for sale in sorting, making a sub-" stantially different article in bulk from that which existed " before the processes were applied. In my opinion, you cannot " deal with the case by saying there was a seed before the process " and the same seed after the process. The process has altered " the bulk and made it legally and commercially saleable." The word " bulk " has crept into these cases and it is useful as signifying that the " article " may be something more than a single unit in a collection of more or less similar units. But the word is not in the Statute and should not be used to limit the cases in which something other than a single unit can qualify as the " article " which must be adapted. I am led to this observation by the reiteration in the decision of the tribunal and in the judgment of the Court of Appeal that this is not to be regarded as a " bulk case." As has often been said, each case must depend on its facts. The processes which adapt the contents of crates of eggs, bales of furs, and " amorphous masses " of rags for sale are widely different, but in all alike something takes place which transforms an unsaleable article into one that is legally and commercially saleable. (I interpolate that, when the statute speaks of adapting for sale, it must mean for commercial sale: presumably even an " amorphous mass " of rags or an unsorted bale of furs might be saleable at some price to somebody.) But I must repeat that the primary facts as found by the tribunal or disclosed in the annexures to the special case lead not to the conclusion that the *only* effect of the sorting and grading was to certify the quality of particular skins nor that the skins are sent in bundles merely for the convenience of dispatch nor that it was not the intention that the skins should be made into a bulk and sold as a bulk, if by that was meant that the consignor did not intend his skins to be matched with other skins and sold in a lot with them, nor that each skin was sold as a single skin nor that selling in lots was only for the convenience of the buyer. This complete misconception of an activity, which in fact transformed a bale of unsorted and ungraded furs, itself commercially unsaleable, into the constituent parts of a number of saleable lots, in my opinion vitiates the conclusion of both the tribunal and the Court of Appeal. There was, in my view, no evidence which justified the findings of fact made by the tribunal. It follows that it came to a conclusion which was erroneous in law.

I have referred, my Lords, only briefly to some of the many cases which were cited to us. They illustrate on the one side of the line or the other the principle that must guide our decision and I do not think that any useful purpose would be served by a closer examination of them. That task has been performed better than I could do it by the Lord Chief Justice of Northern Ireland in *McAllister's* case,[8] and I respectfully endorse what he has said.

It remains, however, to say a word about an aspect of the case which has been ignored. The tribunal in its decision observed that counsel for the respondent submitted that the activity of the appellants was not what he called "a factory "operation" for two reasons, first, because it did not involve "manual labour" as correctly understood, and, secondly, that it did not involve an adapting for sale in accordance with the terms of the authorities. The tribunal, having decided in favour of the respondent on the second point, did not think it necessary to decide the first. The same course was followed by the Court of Appeal. A different view being taken on the second point by this House, the respondent by his counsel fairly enough contends that he is entitled to have a finding of fact made and a decision given by the tribunal on the first point. This is not to be gainsaid. Therefore your Lordships should, in my opinion, allow the appeal with costs here and below in regard to the adapting for sale of the furs which arrive at Beaver House but remit to the tribunal for further determination the question whether in the words of the Statute any manual labour is exercised upon the premises for the purpose of the adapting for sale.

LORD REID. My Lords, the appellants carry on business at Beaver House, London, and they claim that, by reason of the operations which they carry on there, this is an industrial hereditament entitled to derating under the Act of 1928. Under section 3 it is an industrial hereditament if it is occupied and used as a factory or workshop. No question arises under the proviso to section 3 and the premises are not said to be a factory, so the question is whether they are a workshop within the meaning of section 149 of the Factory and Workshop Act, 1901. The relevant parts of that section are: "149.—(1) Subject to the "provisions of this section, the following expressions have in "this Act the meanings hereby assigned to them; that is to "say:— . . . The expression 'workshop' means—(*a*) . . . "(*b*) any premises, room, or place, not being a factory, in which "premises, room, or place, or within the close or curtilage or

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[8] [1954] N.I. 54.

" precincts of which premises, any manual labour is exercised " by way of trade or for purposes of gain in or incidental to " any of the following purposes, namely—(i) the making of any " article or of part of any article; or (ii) the altering, repairing, " ornamenting, or finishing of any article; or (iii) the adapting " for sale of any article; and to or over which premises, room, " or place the employer of the persons working therein has the " right of access or control."

The appellants contend that these premises satisfy the requirements of that definition and in particular that they are used for " the adapting for sale of any article." Two questions arise under this definition: not only must it be shown that premises are used for one (or more) of the stated purposes, but it must also be shown that manual labour is exercised in or incidental to that purpose.

The Central London Local Valuation Court decided against the present appellants, and this decision was affirmed by the Lands Tribunal (Sir W. Fitzgerald Q.C., President). A stated case was asked for, and I must quote the following passages from the case:

" 3. At the hearing before me the facts, which were proved " or admitted, and the contentions put forward by the parties, " are contained in my decision, a signed copy of which is annexed " hereto and forms part of this case, save that the following " further facts were admitted although not referred to in my " decision ": [Then follow certain further findings of fact.]

" ' 5. I am informed that the appellants desire to contend " ' that there was in point of law no evidence to support my " ' findings of fact set out hereunder ':

" (A) ' I put it this way—without the sorting and grading " ' the buyer, unless he were himself an expert, would be taking " ' a risk but the skins are still saleable . . . the conclusion I " ' have come to is that the only effect of the sorting and grading " ' was to certify that the skins were of such a quality as to " ' merit being placed in the category in which they appear in " ' the auction catalogue.'

" (B) ' What is emptied out of the bales that come into the " ' Hudson's Bay Company is not a huge amorphous mass. It " ' is a bundle of easily identifiable individual skins. They are " ' sent in bundles merely for the convenience of dispatch. It " ' is not like the rag case or the seed case in that it is not what " ' has come to be known as a " bulk " case at all. It is not " ' the intention that the skins should be made into a bulk and

" 'sold as a bulk. Each skin is sent to the Hudson's Bay Com-" 'pany to be sold as a skin, in fact the owner might send only " 'one skin although admittedly this would be unusual. It is " 'also bought as a single skin although the bidder bids for a " 'lot that are matched. In a word selling in lots is only for " 'the convenience of the buyer.'

" (C) 'All that has been done here was to arrange the skins.

" 'In my view the process carried out in Beaver House, highly " 'technical as I concede it is, is merely an identification of skins " 'and their arrangement in price classes for sale. Nothing has " 'been done to any skin which in any way makes it a little " 'different to what it was before—I ignore the cleaning of the " 'skins in the drum because it applied to a negligible number of " 'the skins dealt with in Beaver House. There has therefore " 'been no adapting for sale.'

" An extract from the transcript of the shorthand notes con-" taining the evidence relating to these matters (marked A) is " annexed to and forms part of this case."

It appears from the learned President's decision that counsel for the present respondent argued two points: first, that the appellants' operations did not "involve manual labour as correctly "understood," and, secondly, that they did not "involve an "adapting for sale in accordance with the terms of the autho-"rities." The learned President decided against the appellants on the latter question and made no further reference to the first question—no doubt because that was unnecessary once he had decided the other question against the appellants. But there can be no decision that this is an industrial hereditament unless both questions are decided in favour of the appellants. The respondent still maintains his first point, and, accordingly, if your Lordships are disposed to allow this appeal on the question of adapting for sale, either the first question must now be decided by this House on such material as is available or the case must be sent back to the Lands Tribunal so that the learned President may decide the point. I agree with your Lordships that the latter course should be adopted.

But in considering whether there was "adapting for sale" the definition of "workshop" must be read as a whole and, while I express no opinion of any kind as to whether manual labour was exercised in this case, I must, I think, consider the general question of the meaning of "adapted for sale" on the footing that I am only dealing with cases where manual labour is being exercised: so I must leave out of account cases where there might seem to be "adapting for sale" without the exercise of manual labour.

The first question which we have to decide is whether there was evidence to support the findings which I have quoted. For reasons which I shall give in a moment, I am of opinion there was not. But I do not think that we can stop there. The second part of the question in the case is "and whether upon "the findings of fact I came to a correct decision in law." If we reject these findings of the tribunal, we must, I think, come to our own conclusions on these matters and then determine whether there was "adapting for sale"—assuming, as I have said, that manual labour has been exercised in or incidental to the process.

I take first the facts other than those set out above. I think that they can be summarised in this way. Parcels of skins are sent to the appellants from all parts of the world with a view to each skin in the parcel being graded and then matched with and made up into a lot with skins sent by other consignors so that the lot can be sold by auction. The skins in any one lot, which may contain perhaps 70 to 100 skins, are held to be of equal value. So the price, after deducting commission, etc., is divided in equal shares among those consignors whose skins form part of the lot. If only one skin in the lot came from a particular consignor, he gets one share; if, say, 10 skins in the lot came from him, he gets 10 shares. In fact it appears that the lot is bid for and sold at a price per skin, but I can attach no importance to that. The price paid by the buyer is a single sum, the number of skins in the lot multiplied by the sum bid per skin. And the buyer has no concern with and may have no knowledge of who were the consignors of the various skins in the lot.

When a consignment is received the appellants label each skin in it to show from whom it came. This is necessary so that when lots are made up a record can be kept of how many skins in the lot came from a particular consignor. In the case of mink skins these identifications remain until the lot is sold: in the case of other skins the identifications are removed when they are made up into lots, and thereafter it is impossible to tell which skin in the lot came from which consignor.

For a complete picture I must notice three other kinds of consignments. They are not dealt with specially by the tribunal for the good reason that they are relatively unimportant. A number of the skins coming to these premises already belong to the appellants, having been bought by them in Canada and elsewhere.

Then musquash skins are dealt with in a somewhat different way. And it appears that some skins have already been graded before arrival. I shall say no more about these cases.

Grading and matching are highly skilled operations, and grading is done in stages. The miscellaneous skins which come in are separated on inspection into, say, six or ten groups. Then each of these groups is again inspected and subdivided into smaller groups, and so on. This may entail five successive inspections of each skin and this is necessary because there are no less than 250 main grades of persian lamb and 468 main grades of mink. The importance of these operations may be seen from the fact that the appellants charge a commission of 6 per cent. on skins sent in in the ordinary way, whereas they only charge 1½ per cent. in the few cases in which skins have been sorted and graded before arrival.

The reason why consignors send in skins to be dealt with in this way is that they get a much better price for each skin than they could get if they sold ungraded and unmatched parcels or single skins. It appears that there is no market in London for ungraded and unmatched skins. They get a much better price because buyers can rely on the grading, matching and cataloguing done by the appellants: they appear to require matched skins, and in this way they get what they want. Buyers come to these sales from many countries.

I can now return to the findings in fact which are challenged. In (A) it is said that "the only effect of the sorting and grading "was to certify that the skins were of such a quality as to merit "being placed in the category in which they appear in the auction "catalogue." But the skins never appear in the auction catalogue. What appears in the catalogue and what is sold is a matched set of skins. No doubt the sorting and grading do certify the merit of each skin but on my reading of the evidence this is far from being its only effect. The real purpose of the sorting and grading is to enable individual skins to be assembled into matched lots such as buyers wish to buy.

In finding (B) it is said: "It is not the intention that the "skins should be made into a bulk and sold as a bulk. Each skin "is sent to the Hudson's Bay Company to be sold as a skin." To my mind, the evidence contradicts that, and shows clearly that the intention was that the skins should be assembled into aggregates or matched sets, that no skin should be sold as a separate skin, but that all should be sold as parts of sets. I think that this was the intention, whether a consignor sent a single skin or a parcel of skins. Then it is said that the skin is also bought as a single skin, but the whole evidence is to the effect that what the buyer wants and buys is not single skins but matched sets. If each skin were sold and bought as a single skin, then a buyer who buys a lot of 100 skins must enter into 100 contracts. That seems to me an impossible interpretation of the facts. Suppose a lot does not conform to the description in the catalogue or to the sample shown before the auction because one or two skins have not been properly graded and matched. It was not disputed by counsel for the respondent that the buyer would be entitled to reject the whole lot. How could he reject those skins in the lot which conform to the description and sample if there were 100 different contracts. As regards the skins to which no objection could be taken, there would be no breach of the contracts under which they were sold. Then it was argued that there might not be 100 different contracts, but that if the lot contained skins coming from, say, 20 different consignors, there would be separate contracts with each consignor, each contract including all the skins in the lot which came from him. That, in itself, would make little difference. But then it was said that each contract, whether for a single skin or for several skins in a lot, must be deemed to contain a condition that if the buyer were entitled to reject any of the other skins in the lot he could also reject the skins comprised in the contract, although no exception could be taken to them individually. This appears to me to be a wholly artificial conception. Moreover, a buyer may have no means of knowing who the consignors were and whom he is to sue if he finds it necessary to raise an action. Is he to sue a number of defendants in respect of a number of contracts with different people whose names he could only obtain from the appellants? In my opinion the skins in the lot were clearly sold as one lot under one contract. We do not have either the conditions under which consignors sent their skins to the appellants or the conditions governing the sales by auction. I would be very surprised if there were anything in them to bear out this finding, and in the absence of these conditions I think that we must hold that these operations have been conducted in a reasonable manner, and that no such complications as are suggested have been introduced. They might well make the whole scheme unworkable. I see no difficulty in law in the consignors making agreements with the appellants, under which the appellants are entitled to sell their skins, together with skins belonging to others, to a buyer who buys the lot under a single contract. But

I would not like to try to draft conditions which resulted in the fall of the hammer creating 100 different contracts with the buyer.

Finding (C) adds nothing new to the findings in fact but perhaps it gives a clue as to how the learned President came to make these findings. He appears to have thought that because the skins were readily identifiable when received by the appellants, and also identifiable when sold to the buyers, a lot which was sold could not in law be regarded as anything other than a number of separate skins, and so he may have thought that in fact they were sold as separate skins. I shall have to deal with the legal position later, but it may be that the learned President's understanding is in accordance with some practice which has prevailed in the past and should not be imputed to him as a serious error.

Do the facts which I have summarised involve "adapting for "sale" or not? That depends on the proper construction of those words in the Act of 1901, and on that matter we find authoritative guidance in the series of cases reported as *Bailey* v. *Potteries Electric Traction Co. Ltd.*[9] and *Sedgwick* v. *Watney, Combe, Reid & Co.*[10] I get most help from that part of the judgment of Scrutton L.J.[11] which deals with what he calls processes roughly described as sorting, parts of which were expressly approved in this House,[12] and no part of which was disapproved. We are construing words in the Factories Acts and Scrutton L.J.[13] began by pointing out that if we deprive the occupier of the benefit of derating we are also depriving the workers of the protection of these Acts, and that in construing these Acts the courts have given a wide meaning to their words, e.g., "putting chocolates into a decorated box, in *Fuller's* "case[14]" has "been treated as 'adapting for sale' to protect "the work-people employed in that occupation."

In reading this judgment and Lord Dunedin's speech in this House, it should be borne in mind that they did not have to deal with a case where individual things were assembled into an aggregate which was saleable when the individual things were not, or which at least fetched a much better price than the total of any sums which could have been got by selling the things separately. They were dealing with cases where things (rags and seeds) came in in bulk. Scrutton L.J. said[15] that these cases cannot be

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[9] [1931] 1 K.B. 385.

[10] [1931] A.C. 446.

[11] [1931] 1 K.B. 385, 492–495.

[12] [1931] A.C. 446, 483, 484.

[13] [1931] 1 K.B. 385, 493.

[14] [1901] 2 K.B. 209.

[15] [1931] 1 K.B. 385, 494.

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determined simply by saying: "no sorting is 'adaptation for "'sale.' The original bulk may be such that it cannot be sold "either legally, as in mixed seeds, or commercially, because an "unsorted bulk is not wanted, and the process of sorting may "be so complicated and mechanical as to deserve the title of a "manufacturing process, i.e., of 'adapting for sale.' On the "other hand, the bulk and the article to be sold may be so "similar and of such a nature, such as taking a quarter of a "pound of bull's-eyes out of a bulk in a bottle, that the separation "or sorting may well be regarded as an entirely minor incident "of the sale or distribution." When he used the words "mechanical" and "manufacturing process" he was dealing with a question whether premises were a factory. The question here is whether they are a workshop, and I find in section 149 (4) of the Act of 1901 reference to "the manufacturing process or "handicraft carried on in the factory or workshop," so it would, I think, be legitimate to adapt his words and ask whether this process deserves the title of "a handicraft."

Then Scrutton L.J. continued [16]: "Where substantial changes "are made in the article, as in the seed-cleaning case, I see no "difficulty in holding the process to be adapting for sale. But "in view of the fact that 'adapting for sale' is a separate head "from altering, I see no reason for requiring alteration of substance to make 'adapting for sale.' If this were necessary, "there would be no need to insert 'adapting for sale.' Where the "process of separation or sorting is complicated and substantial, "again I think there is adapting for sale. In many cases, it is a "question of degree, which is in my view fact and not law, and "not properly the subject of a special case. Further, the section "in the Factory Act, 1901, deals with an 'article' which I think "means an article to be sold." I may say in passing that it is unnecessary to deal in this case with the vexed question of what is fact and what is law, because if the findings in fact of the tribunal cannot stand the whole matter is open for us. I shall return to the rest of the quotation when I come to the so-called bulk principle.

Following the line of that judgment I would think the question in this case to be whether things which cannot be sold commercially because they are not wanted (individual skins or miscellaneous parcels of skins) have been made into articles readily

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[16] [1931] 1 K.B. 385, 495.

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saleable (matched sets of skins) by a process sufficiently complicated and substantial to deserve the title of "handicraft." And I would further think that there can be adapting for sale without alteration of substance, for the reason given in the passage I have quoted.

But this is said to be in conflict with the view of Lord Dunedin in the cable testing case (*Grove's* case [17]): "I think 'adapting for "'sale' points clearly to something being done to the article in "question which, in some way, makes it in itself a little different "from what it was before." In the cable testing case the cable came in unassociated with any other article and it went out unassociated with any other. Lord Dunedin had set out the conflicting views between which he had to choose. Slesser L.J. had said: "the testing of the cables was part of the process of making "them fit for sale," and Scrutton L.J. had said: "The cables "are not adapted for sale but tested to see if they are fit for "sale." Lord Dunedin's apt illustration was [18]: "If a horse is "passed sound by a veterinary surgeon it becomes saleable in a "way it was not before he was so passed, but no one would dream "of saying that the veterinary surgeon by his certificate adapted "the horse for sale." Certainly testing or certifying is not adapting, and where there is no question of association with other things I wholly agree that adapting must involve some physical change—some alteration of the article. But I do not think that Lord Dunedin meant to say that, commercially at least, the whole can never be greater than or different from the sum of its parts. He was not dealing with any such question, and I think it worth noting that at the end of his speech he said [19]: "It may be "difficult or impossible to identify the essential quality of the "operation described in section 149 of the Factory and Workshop "Act, 1901, as 'the adapting for sale of any article,' nor in my "view is it necessary for the purposes of this case to do so. The "phrase was probably introduced to secure somewhat more "flexibility than is to be found in the immediately preceding "terms—namely, 'the altering, repairing, ornamenting or finishing of any article.'" I do not think that Lord Dunedin could have said that if he had intended his words in the cable testing case to be universally applicable. Making an article "in itself a "little different from what it was before" is simply altering it, and the introduction of the phrase "adapting for sale" would

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[17] [1931] A.C. 450, 467.

[18] Ibid. 468.

[19] Ibid. 493.

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have failed to introduce any more flexibility if adapting necessarily involved such alteration.

The respondent's argument was that if there has been no alteration of individual things there can be no adapting for sale unless the case can be brought within the "bulk principle." This so-called principle appears to have been evolved by taking observations of Lord Dunedin and Scrutton L.J. made in cases where the things to be adapted were "bulks" or aggregates (rags or mixed seeds), and regarding them as equally applicable where the process is the adaptation of individual things by combining them into readily saleable sets or aggregates. I see no justification for this. It would seem that the theory behind this so-called principle is that you must always have an article at the beginning of the process, and the same article altered or adapted at the end. Where there is a bulk at the beginning and another bulk at the end you are entitled to regard the original bulk as persisting and merely emerging in a different form. This appears to me to be in many "bulk" cases nothing but a fiction. If six "bulks" of rags came in from different consignors, and each is first sorted into 10 different heaps, and then the corresponding heaps from each bulk are mixed together for further sorting, surely the six original bulks have ceased to exist as bulks. And if 100 bales, each different from the others, are produced at the end of the sorting process, it seems to me rather fantastic to say that any of the original bulks has continued to exist throughout the process. The individual rags have continued to exist physically unaltered but they emerge different from what they were at the beginning: they were originally parts of mixed aggregates and of little value, but they are now parts of matched aggregates of much greater value.

I said a few moments ago that I would return to the rest of a quotation from the judgment of Scrutton L.J.[20]: "The bulk "bought at one price is altered or adapted for sale into a bulk "of a smaller size and different character which can be sold "because of the alteration or adaptation at a much higher price. "It is this principle which I think should be applied to the "various cases involving sorting, which I consider separately." That may be an adequate explanation where one bulk comes in and one goes out, and it may have been sufficient for the cases he was then considering, but I see no reason to deny adapting for sale in every case which it does not fit.

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[20] [1931] 1 K.B. 385, 495.

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The opinion of Lord Sands on this matter in *Inland Revenue* v. *Easson Brothers*[21] was approved both in the Court of Appeal[22] and in this House.[23] He says[24]: "If what had happened was "that the papermaker had come into the premises saying, 'I "'want a blue cotton rag' or 'a piece of brown paper,' I could "understand the argument that there had been no adaptation of "the particular article for sale. All that had been done was to "arrange the articles so as to avoid the trouble of having to "rummage through the heap whenever a papermaker came in "and asked for something. But that is not the condition of the "problem. If one regards the whole mixed mass that comes into "the works, that mass has been adapted for sale, or made sale-"able, by laborious assortment. If one regards the final bale, its "contents have been adapted for sale by a process whereby each "rag or each piece of paper, in itself worthless, has been associa-"ted with a thousand similar ones laboriously picked out." The first of these two ways of regarding the matter may not fit the present case but the second does. If the "bulk principle" has concentrated attention on the first of these two ways then it is not, in my judgment, wide enough to comprehend all the cases where there can properly be said to have been adapting for sale.

It does not follow that every case where there is laborious picking out of similar articles will qualify as adapting for sale. In *Davis Cohen & Sons Ltd.* v. *Hall*[25] an example was given of picking out pairs of boots from a mixed heap. I would agree that that falls far short of what is necessary. But if there had been several hundred different qualities of boots in the heap, if a lengthy process and great skill had been necessary to separate them, and if customers had required matched sets of a dozen pairs, the case might well have been different. Apart from the question of manual labour I am of opinion that, in the present case, there clearly was adapting for sale and, therefore, this appeal should be allowed.

LORD TUCKER. My Lords, I agree with the opinions expressed by my noble and learned friends that the appeal should be allowed.

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[21] 1930 S.C. 480.

[22] [1931] 1 K.B. 385, 505, 509, 520, 521.

[23] [1931] A.C. 446, 481, 484.

[24] 1930 S.C. 480, 485.

[25] [1952] W.N. 33; [1952] 1 All E.R. 157.

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1959

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LORD KEITH OF AVONHOLM. My Lords, this appeal is concerned with the assessment of certain premises in the City of London belonging to the appellants, whom I shall call "the "company," assessed at £15,848 gross value and £13,178 rateable value. The appeal comes to this House after unsuccessful appeals by the company to the Lands Tribunal and to the Court of Appeal against a decision of the Central London Local Valuation Court confirming the assessment. The contention of the company is that it is entitled to derating of its premises in whole or in part. The premises consist of three parts, known as Beaver Hall, Beaver House, and the Carpenter's Workshop respectively. In Beaver Hall auction sales of furs, prepared for auction in Beaver House, take place. It is with Beaver House that the appeal is primarily concerned.

I take the problem as stated by the Lands Tribunal. "It is "the company's contention that Beaver House is primarily "occupied and used by it for the sorting and grading of furs, "that by means of that sorting and grading bales of assorted "and ungraded skins sent in by trappers and breeders from "various parts of the world are changed into saleable lots of "sorted and graded skins. It may be said, therefore, that the "real issue upon which this case will depend is whether what "is done to those skins is or is not adapting for sale within the "meaning of the Factory Act."

What takes place in Beaver House is set out by the Lands Tribunal in a short passage, which I shall find it necessary in a moment to amplify, as follows:

"Bales of skins are addressed from almost all parts of the "world except the Soviet Union. They arrive in lorries at the "reception basement. They are unloaded on to lifts and conveyed to the first floor where the bales are opened and are "sorted according to types—the bales consist of mixed skins of "various animals. The sorted bundles are then passed up to "the next floor, some of the skins which may be dusty or gritty "are put in drums with clean sawdust and whirled round. This "eliminates the dust and grit. This process is necessary only "in the case of very few, indeed almost a negligible quantity of "the skins that come in. Next comes the process on which the "appellants mainly rely to establish their contention that there "is an adaptation for sale. The skins are passed along in trollies "to the sorters' counters. The counters extend along the room "which is especially lighted with artificial light and large windows. The sorters are men who have been specially trained "in the art of sorting. It is said that it takes about ten years to "make a man an entirely efficient sorter. The sorter takes the "skin and grades it either by its feel or visual appearance. "Immediately behind the sorter is a trolly with various shelves. "Each shelf represents the class which the sorter assigns to the "skin. These grades of skin are then conveyed to another "sorting room where there are sorters who can be described as "final specialists. These sorters examine the skins and either "confirm the grading or up- or down-grade the skins again. "After this final grading the skins are catalogued and passed "down to the display room. There they are displayed for some "days and prospective buyers come along to examine them and "bid for them at the auctions which are held about three times "yearly.

"The skins are still in a raw state in the sense that they "could not be used as furs. They have to undergo a highly "technical process which converts them from skins into saleable "furs. This process is not undertaken at Beaver House. It "is carried out by the furriers who buy the skins at the auction."

The evidence relating to the processes carried out in Beaver House is annexed to and forms part of the case. And for a fuller understanding of these processes, I would expand the findings of the Lands Tribunal set out above as follows:

Beaver House may be described as a sorting establishment. But it is a sorting establishment with a very definite object. The object is to sort the skins into lots so that every skin in the lot matches every other skin in the lot so nearly that every skin may be said to be identical with every other skin. They are so identical as to be indistinguishable. It is known how many skins belonging to any consignor go into any particular lot. The price realised for any lot is divided equally among the particular consignors in proportion to the number of skins he has contributed to the particular lot, each skin being treated as of equal value with every other skin in the lot. Thus each skin in a lot may be said to have the same value, the same quality, the same colour, the same size, the same pattern, and, of course, the same class of animal. At present the popular and largest classes of skin dealt with are Persian lamb and mink. Persian lamb is sorted first into size of curl—extra large, large, medium, small and extra small. These sizes, again, are divided into patterns of curl, of which there are a considerable number. Of one pattern, described as "A" pattern, in the highest class, it was said that out of 500,000 skins or thereby only 300 skins of that pattern might be obtained. There are no less than 250 main grades and 880 sub-grades of Persian lamb. Of mink, again, there are no less than 468 main grades, and of beaver, 60 main grades. Persian lamb skins are graded by sight and mink by touch and the process is a highly expert job. The lots vary greatly in value according to quality, with resulting differences in prices realised at the auction. It is of prime importance to the buyer that all the skins in a particular lot are precisely matched for they are bought to be made after processing into coats or other articles of attire. As stated in evidence: "It is "a mammoth undertaking to equalise these lots so that every "buyer knows he is going to get the same quality. That is "why there are so many sub-grades; it is equalisation really." A good sorter, it was said, would put out 1,000 to 1,500 skins a day.

This is a short resumé of the nature of the process. The result of it is that the prices obtained at auctions for the furs and skins sold greatly exceed the prices that could be obtained by the producers or owners of the skins if they were sold direct to the trade in a mixed or unsorted quantity. What in effect happens is that producers from all over the world put their skins into a vast pool, from which a sufficient number of skins can be made up into a great number of lots of matched skins of different value and quality suitable to the requirements and demand of the fur-making trade whether wholesale or retail. The owners of the skins do not lose the property in the skins until they are sold by auction. It would seem that they are treated as owners in common of the respective lots in proportion to the extent of their individual contribution to the lot and share in the price realised for each lot accordingly. In the case of Persian lamb the identity indeed of the separate skins making up a lot is lost. In the case of mink, the identity of the owners of the separate skins is, for some reason not explained, retained by a tab on each skin. But if in each case the price realised is allocated in proportion to contribution, this difference would seem to be immaterial.

The question of law raised by the case is whether there has been such an adapting for sale of the skins that come into Beaver House as to make these premises an industrial hereditament within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928. That again turns upon whether the premises are occupied and used as a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920. The relevant provision is section 149 of the Factory and Workshops Act, 1901, which defines "workshop." The material words for this case are: "The expression 'workshop' "means . . . any premises . . . not being a factory, in which "premises, . . . any manual labour is exercised by way of trade "or for purposes of gain in or incidental to any of the following "purposes, namely . . . (iii) the adapting for sale of any article, "and to or over which premises . . . the employer of the "persons working therein has the right of access or control:".

This section has frequently been considered in connection with claims for derating and your Lordships had a full citation of the relevant authorities. I find it unnecessary to consider these in any detail. None of them, in my opinion, quite touches the problem in the present case. Those which were claimed as approaching the nearest to the circumstances of the present case were *Inland Revenue* v. *Easson Brothers*[26] and *Kaye* v. *Burrows*[27] (rag sorting); *Hines* v. *Eastern Counties Farmers' Co-operative Association*[28] (seed cleaning); and *Richardson (A.) & Son* v. *Middlesbrough Borough Assessment Committee*[29]; and *Valuation Commissioner* v. *McAllister*[30] (egg packing). I quote one passage from the judgment of Scrutton L.J. as indicating the general nature of the problem[31]: "In my view the question "whether sorting or separation of an article to be sold from a "bulk is an adapting for sale depends on the facts of each "particular case, and cannot be determined simply by saying: "'no sorting is adaptation for sale.' The original bulk may be "such that it cannot be sold either legally, as in mixed seeds, "or commercially, because an unsorted bulk is not wanted, and "the process of sorting may be so complicated and mechanical "as to deserve the title of a manufacturing process, i.e., of "'adapting for sale.' On the other hand, the bulk and the "article to be sold may be so similar and of such a nature, such "as taking a quarter of a pound of bull's-eyes out of a bulk in "a bottle, that the separation or sorting may well be regarded "as an entirely minor incident of the sale or distribution."

At the risk of some repetition I would also quote a well-known passage from the opinion of Lord Sands in *Easson's* case,[32] in part quoted and approved by Lord Dunedin in *Hines's* case [33] and by Greer L.J.[34]: "On the counter emptied out of "the collecting carts there is a huge amorphous mass of waste "paper, rags, etc., mixed with dirt and rubbish, which no paper "manufacturer would look at. The workers produce a number "of orderly bales in eighty different classes which the paper-"makers readily buy for substantial sums. Can it reasonably "be said that there has been no adaptation for sale of the mass "of material which was emptied out of the carts, and which so "far as not discarded as dirt or rubbish, is now arranged in "orderly merchantable bales? I understand the argument to "be that, if you look at one particular rag or one particular "scrap of paper, that rag or that scrap of paper has not been "subjected to any treatment which alters it or adapts it for "sale. As it appears to me, this is an altogether artificial and "superficial argument. The papermaker is not buying one rag "or one piece of waste paper; he is buying a bale. If what "had happened was that the papermaker had come into the "premises saying, 'I want a blue cotton rag' or 'a piece of "'brown paper,' I could understand the argument that there "had been no adaptation of the particular article for sale. All "that had been done was to arrange the articles so as to avoid "the trouble of having to rummage through the heap whenever "a papermaker came in and asked for something. But that is "not the condition of the problem. If one regards the whole "mixed mass that comes into the works, that mass has been "adapted for sale, or made saleable, by laborious assortment. "If one regards the final bale, its contents have been adapted "for sale by a process whereby each rag or piece of paper, in "itself worthless, has been associated with a thousand similar "ones laboriously picked out." The last sentence in this passage is not in the excerpt quoted by Lord Dunedin and Greer L.J. but it has, I think, a significant relevance to the facts of this case.

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[26] 1930 S.C. 480.

[27] [1931] A.C. 454, 477; [1931] 1 K.B. 469, 509, C.A.

[28] [1931] A.C. 456, 477; [1931] 1 K.B. 446, 502.

[29] [1947] K.B. 958; 63 T.L.R. 413; [1947] 1 All E.R. 884.

[30] [1954] N.I. 54.

[31] [1921] 1 K.B. 385, 494.

[32] 1930 S.C. 480, 485.

My Lords, the view of the Lands Tribunal is expressed in the following passages, which are expressly challenged by counsel for the company as being inadequately supported by the evidence in the case:

"(A) I put it this way—without the sorting and grading "the buyer, unless he were himself an expert, would be taking "a risk but the skins are still saleable . . . the conclusion I "have come to is that the only effect of the sorting and grading

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[33] [1931] A.C. 456, 481.

[34] [1931] 1 K.B. 385, 520.

"was to certify that the skins were of such a quality as to "merit being placed in the category in which they appear in "the auction catalogue.

"(B) What is emptied out of the bales that come into the "Hudson's Bay Company is not a huge amorphous mass. It is "a bundle of easily identifiable individual skins. They are sent "in bundles merely for the convenience of dispatch. It is not "like the rag case or the seed case in that it is not what has "come to be known as a 'bulk' case at all. It is not the "intention that the skins should be made into a bulk and sold "as a bulk. Each skin is sent to the Hudson's Bay Company "to be sold as a skin, in fact the owner might send only one "skin although admittedly this would be unusual. It is also "bought as a single skin although the bidder bids for a lot "that are matched. In a word selling in lots is only for the "convenience of the buyer.

"(C) All that has been done here was to arrange the skins.

"In my view the process carried out in Beaver House, "highly technical as I concede it is, is merely an identification "of skins and their arrangement in price classes for sale. "Nothing has been done to any skin which in any way makes "it a little different to what it was before—I ignore the cleaning "of the skins in the drum because it applied to a negligible "number of the skins dealt with in Beaver House. There has "therefore been no adapting for sale."

The grounds on which the Court of Appeal upheld the findings of the Lands Tribunal would appear to be contained in the following passage[35]:

"If on the facts the articles to be sold could properly be "regarded as a bulk of sorted, matched and graded skins pro-"duced by these operations from an aggregate of unsorted, "unmatched and ungraded skins, then there would be much to "be said for the view that there was here an adapting of the "skins for sale on the principle of the various 'bulk' cases "already quoted.

"But we cannot regard this as a 'bulk' case. We think "the article to be sold must on the facts consist of each in-"dividual skin belonging to each intending vendor. Each parcel "delivered at the hereditament for sale comprises individual "skins of the number and types particularised in the invoice, "and each of those skins is marked as the property of the

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[35] [1958] 1 W.L.R. 955, 973.

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"intending vendor and thenceforth dealt with as such. The "auctioneer employed by the company when he sells each lot "at so much per skin must be taken as selling each individual "skin comprised in it as agent for and on behalf of the vendor "to whom it belongs. We do not see how this can be treated "as a 'bulk' case consistently with the system of sale in fact "adopted. It is of the essence of the 'bulk' principle that "the components of the bulk should lose their identity in the "bulk, so that the bulk and not its individual components can "properly be regarded as the article to be sold. That is plainly "impossible here. The whole system of sale depends on the "identity and ownership of individual skins being preserved. "The elaborate system of sorting, matching and grading enables "each individual skin to be sold to the best advantage as part "of a uniform lot, but we cannot regard it as an adapting for "sale."

My Lords, I would accept it that this is not what is generally understood as a "bulk" case. What comes in is a large collection of parcels of individual skins from a large number of owners who wish their skins to be sold by the methods known to be adopted by the company. They retain throughout the ownership of their skins until sale and the company is their agent to prepare these skins for sale. The skins are dealt with individually in the sense that they are picked out individually from their respective parcels, matched with other skins for fineness, quality, colour, size and pattern and put into lots for sale as lots in which each individual component of the lot is practically indistinguishable from its fellows. This results in an enhanced price for the individual skins which would otherwise be quite unobtainable. I have come to the view that, in spite of the individual treatment accorded to each skin and the fact that each skin may be said to be the subject of sale though only as an item in a lot which must be bought as a whole, there is here an adaptation for sale. It was contended that this would go contrary to the dictum of Lord Dunedin in *Grove* v. *Lloyds British Testing Co. Ltd.*[36]: "I think 'adapting for sale' points clearly to something being "done to the article in question which, in some way, makes it "in itself a little different from what it was before." In my view this must not be read too narrowly. The process here has enhanced the value of each individual skin and that is a change of a peculiar and unusual character. With the poet it may be said that each skin has suffered

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[36] [1931] A.C. 446, 467.

"... a sea change
"Into something rich and strange."

The process by which this has been done may well be described in the words of the witness already quoted as "a mammoth "undertaking," though the process may be the easily understood one of selection and arranging. In the rag picking case,[37] different as it is, Lord Sands used words with reference to the process which might easily be adapted here: "The papermaker "is not buying one rag or one piece of waste paper; he is buying "a bale." Here the buyer is not buying one skin, he is buying a lot of matched skins. "If one regards the whole mixed mass "that comes into the works, that mass has been adapted for "sale, or made saleable, by laborious assortment." Here if one regards the collection of parcels of unmatched skins that come into Beaver House, that collection had been adapted for sale, or made saleable, by laborious assortment. Or again, in the words of Lord Sands, at the end of the passage already quoted, the skins "have been adapted for sale by a process "whereby each . . . has been associated with a thousand similar "ones laboriously picked out."

Though this is not, in my opinion, a "bulk" case it has many similarities to such a case. The Lands Tribunal was, I think, wrong in regarding the sorting and grading of the skins as a mere certificate of quality, or a mere arrangement of the skins. And the Court of Appeal, I think, went wrong in regarding the individuality of the skins and their continuing ownership until sale as a conclusive factor for refusing derating.

In the peculiar circumstances of this particular trade I am prepared to hold that there was an adapting for sale. I would accordingly allow the appeal.

LORD DENNING. My Lords, the question whether premises are a "workshop" depends, to my mind, on the nature of the work that is carried on therein. It does not depend on the ownership of the articles which are worked upon, nor upon the contracts that are made in regard to them. And it is not to be solved, I think, by asking whether the articles come in or go out in bulk. It is

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[37] 1930 S.C. 480, 485.

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to be solved by asking two questions: 1. What is the purpose of the work being done? 2. How is that purpose being achieved? You must find the purpose to be one of three: Put shortly, these are (i) the making of any article or articles, (ii) the altering of them, (iii) the "adapting" of them "for sale." And you must find that the purpose is achieved "by means of manual labour," that is exercised by way of trade or for purposes of gain.

I ask myself, therefore, first, What was the purpose of the work done on these skins? It was, I think, clearly the adapting of them for sale. When they came into Beaver House, they were mixed up in bales containing skins of much variety. They varied according to the kind of animal, the place of origin, the size of skin, the length of hair, the thickness and density of fur, colour, pattern and durability. These skins, as mixed up, were virtually unsaleable in the London market. The work that was done on them consisted in splitting up the bales into the component skins, sorting them, grading them, matching them, and eventually making them up into lots in which each skin was the same as every other. As such they were readily saleable in the London market.

If it were a question of putting these skins into categories according to "bulk," I must say that I would not myself put these skins into the same category as heaps of waste paper, sacks of seeds or piles of stones—where it may truly be said that the identity of each particle is lost in the mass. I would put these skins more in the category of eggs which come in for grading, or sweets which have to be packed attractively in boxes—where each item retains its identity and has to be handled individually. But I do not find these categories to be of much help. No matter whether you consider the articles to be an amorphous mass or to be a group of items, you have still to answer the same question, What is the purpose of the work being done on them? Are they being adapted for sale? The answer in the case of these skins is clearly "Yes." They are being adapted for sale. So the first question must be answered in favour of the appellants.

But there still remains the second question: How is this purpose being achieved? Is it by means of manual labour? This question is not left to your Lordships by the case stated. The facts relating to it have not been found. The arguments for and against have not been put before your Lordships. The case must go back to the Lands Tribunal for the question to be determined.

I would allow the appeal accordingly.

Appeal allowed.
Case remitted to the Lands Tribunal.

Solicitors: *Linklaters & Paines; Solicitor, Inland Revenue.*

J. A. G.

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . APPELLANT;
AND
VERNAZZA . . . . RESPONDENT.

H. L. (E.)*
1960
June 20;
July 21.

Practice—Vexatious litigant—Order prohibiting him from instituting proceedings without leave of the court—Appeal—Subsequent Act empowering court to make orders covering continuing proceedings—Proceedings already begun by vexatious litigant—Jurisdiction of Court of Appeal to make order prohibiting their continuance without leave—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 51 (1)*—Supreme Court of Judicature (Amendment) Act,* 1959 (7 *&* 8 *Eliz.* 2, *c.* 39), *s.* 1 (1).

Statute — Retroactive effect — Appeal — Whether new law applicable—Procedural point or substantive right—Vexatious litigant—Court of Appeal—Jurisdiction to vary High Court order to accord with new Act.

Court of Appeal—Jurisdiction—New Act passed after hearing below—Whether applicable on appeal—Procedural point or substantive right — Acts dealing with vexatious litigants — R.S.C., Ord. 58, *rr.* 3 (1), 9 (3).

By section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925: "If on an application made by the Attorney-"General . . . the High Court is satisfied that any person has "habitually and persistently and without any reasonable ground "instituted vexatious legal proceedings . . . the court may . . . "order that no legal proceedings shall without the leave of the "High Court . . . be instituted by him in any court, and such "leave shall not be given unless the court . . . is satisfied that the

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD KEITH OF AVONHOLM, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

"proceedings are not an abuse of the process of the court and that "there is prima facie ground for the proceedings."

By section 1 (1) of the Supreme Court of Judicature (Amendment) Act, 1959: "In subsection (1) of section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925, . . . after the words "'in any court' there shall be inserted the words 'and that any "'legal proceedings instituted by him in any court before the "'making of the order shall not be continued by him without such "'leave.'"

On April 9, 1959, the High Court made an order on the application of the Attorney-General, under section 51 (1) of the Act of 1925, that no legal proceedings without leave of the court should be instituted by V. Against this order V. appealed by notice of appeal dated May 21, 1959. On May 14, 1959, the Act of 1959 had been passed and came into force. The Attorney-General, by a notice of contention dated October 29, 1959, asked the Court of Appeal to vary the order of the High Court by adding an order that any legal proceedings instituted by V. before the making of that order should not be continued by him without leave:—

Held, that the Court of Appeal, which on the merits held V. to be a vexatious litigant, had jurisdiction so to vary the order, and the High Court could itself have made an order in such terms had it been applied for. Assuming that the terms of the amending Act were retrospective, they were procedural, providing a new remedy, but not altering substantive rights. V. was not deprived of a substantive right, since it was still open to him to prosecute a claim which was not an abuse of the process of the court and for which there was a prima facie case. Although the Court of Appeal had no original jurisdiction, it was entitled to employ the extended procedural power, made available by the amending Act since the decision of the court below, as a remedial and preventive measure against vexatious litigation.

Quilter v. *Mapleson* (1882) 9 Q.B.D. 672, C.A. applied.

Colonial Sugar Refining Co. Ltd. v. *Irving* [1905] A.C. 369; 21 T.L.R. 513, P.C. and *In re a Debtor* (*No. 490 of 1935*) [1936] Ch. 237; 52 T.L.R. 70, C.A. distinguished.

Decision of the Court of Appeal [1960] 1 Q.B. 197; [1960] 2 W.L.R. 135; [1960] 1 W.L.R. 183, C.A. varied.

APPEAL from the Court of Appeal (Ormerod, Willmer and Harman L.JJ.).

This was an appeal by leave of the House of Lords from that part of an order of the Court of Appeal dated December 2, 1959, whereby the Court of Appeal dismissed a cross-appeal brought by the appellant, the Attorney-General, on a notice of contention dated October 29, 1959, that an order of the Queen's Bench Divisional Court dated April 9, 1959, under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that the respondent, "Anthony Vernazza, be prohibited . . . from instituting proceedings in the High Court or in any other court unless he "obtains the leave of the High Court or a judge thereof and "satisfies the court or judge that such legal proceeding is not an "abuse of the process of the court and that there is a prima facie "ground for such proceeding" should "be varied by adding "thereto an order that any legal proceedings instituted by the "said Anthony Vernazza in any court before the making of "the said order shall not be continued by him unless he obtains "the leave of the High Court or a judge thereof and satisfies the "court or judge that such legal proceeding is not an abuse of the "process of the court and that there is a prima facie ground for "such proceeding."

On February 19, 1957, the Attorney-General gave notice that he would apply to the Divisional Court of the Queen's Bench Division for an order pursuant to section 51 of the Act of 1925 that no legal proceedings should be instituted by the respondent in any court without the leave of the High Court or a judge thereof. The application was based on the allegation that the respondent had "habitually and persistently and without any "reasonable ground instituted vexatious legal proceedings." The application was heard on April 9, 1959. It was successful, and an order was made as asked. The respondent had, however, some pending proceedings which he had already instituted, and the order did not affect them. At that date the High Court had no power to prohibit him from continuing proceedings which he had already started. But on May 14, 1959, the Supreme Court of Judicature (Amendment) Act, 1959, was passed, which empowered the court to prohibit the continuance of existing proceedings without leave. On May 21, 1959, the respondent appealed to the Court of Appeal. By leave of the Court of Appeal the Attorney-General served on the respondent the notice of contention dated October 29, 1959. The Court of Appeal dismissed the appeal and also the cross-appeal, considering that they had no power to make the order asked for.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* for the appellant. As to the jurisdiction of the Court of Appeal to make the order now sought, reliance is placed on section 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and, in particular, the wide words " . . . the Court "of Appeal shall have all the power, authority and jurisdiction "of the High Court . . ." Since the respondent does not now seek to present any argument on the merits, the sole question is whether the Court of Appeal had power to vary the order of the Divisional Court as asked.

Clearly section 1 (1) of the Supreme Court of Judicature (Amendment) Act, 1959, gave the Divisional Court power to make an order in relation to proceedings commenced before May 14, 1959, for that Act was expressly directed to apply to pending actions. If the application to the Divisional Court had come on after that date, it would have had power to make the order now sought.

The effect of an order under the Act is not to take away or destroy any substantive right of the respondent; it merely imposes a fetter which only affects actions which are vexatious and an abuse of the process of the court.

By virtue of section 27 (1) of the Act of 1925, the Court of Appeal had power to make an order under the Act of 1959 prohibiting the respondent from continuing without leave of the court any proceedings which he had instituted. If the Court of Appeal had "all the power, authority and jurisdiction of the "High Court," it had power to vary the order of the Divisional Court in accordance with the Act of 1959. This follows from *Quilter* v. *Mapleson*,[1] where the basis of the decision of the Court of Appeal was that section 14 (2) of the Conveyancing and Law of Property Act, 1881, was retrospective, and that the Court of Appeal, accordingly, had power to do what the High Court could have done. The present case is a fortiori that case. There is nothing to suggest that any distinction is to be drawn between actions started before and actions started after May 14, 1959. *Colonial Sugar Refining Co. Ltd.* v. *Irving*[2] is not inconsistent with the appellant's argument. There is a great difference between the case of a vested right of action which is taken away completely by a statute, and that of an Act which leaves intact the right to bring an action, subject to a matter of procedure. The only right taken away by an order under the Act of 1959 is the right to continue an action which is an abuse of the process of the court or is vexatious. In *In re a Debtor* (*No. 490 of 1935*)[3] the facts were far removed from those of the present case.

There is nothing which can be read into the Act of 1959 to limit its effect to litigation commenced after May 14, 1959. If the decision in the court below is right, then even on an application made to the Divisional Court on May 18, 1959, the court could only have restrained the continuance of actions started since May 14, 1959. If the necessary intendment of an Act is to affect pending actions, effect will be given to the intention of the legislature, even though there is no express reference to them: see *Hutchinson* v. *Jauncey*.[4]

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[1] (1882) 9 Q.B.D. 672, C.A.

[2] [1905] A.C. 369, 372; 21 T.L.R. 513, P.C.

[3] [1936] Ch. 237; 52 T.L.R. 70, C.A.

W. A. Bagnall for the respondent. The sole submissions now made are on the question of law. This is purely a technical question. It is not sought to argue that the Act of 1959 did not apply to the pending actions in this case. If on May 15, 1959, the Divisional Court had been moved for the order now sought, that court could have made it.

Some confusion has arisen as to the expression "pending "actions." One must distinguish between the proceedings which the respondent had himself instituted against other litigants before the Attorney-General proceeded against him and the proceedings which the Attorney-General has taken against the respondent. One must consider the use of the expression in *Quilter's* case[5] and *Hutchinson's* case.[6] The expression may be used in two different senses. Section 1 of the Act of 1959 does not in express terms apply to pending actions in the sense of the proceedings under appeal in the appellate court and so is not retrospective in relation to them. The present question is not the one which was being considered in the two authorities just referred to. This is not a case in which, on principle and authority, the Court of Appeal were entitled to give effect to legislation which had intervened between the hearing at first instance and the appeal and has changed the law. If the present respondent had not himself appealed, it would have been open to the Attorney-General to move the Divisional Court for the order for which he now asks.

The question is whether (as the respondent contends) in determining the cross-appeal the Court of Appeal was bound to apply only the relevant statute law in force at the date of the hearing before the Divisional Court, or whether (as the appellant contends) it was bound or entitled to have regard to subsequent legislation. Although appeals to the Court of Appeal are admittedly by way of rehearing (R.S.C., Ord. 58, r. 3 (1)), that court is bound to apply the law in force at the date of the order under appeal, and to disregard legislation subsequent thereto unless (a) the subsequent legislation applies in express terms to pending actions or is otherwise retrospective in its operation, or (b) the subsequent legislation merely affects procedure and does not affect substantive rights. Section 1 of the Act of 1959 does not, on its true construction, fall within either of these qualifications. Admittedly, the subject-matter of that section is the right of a litigant, in relation to whom the conditions prescribed by section 51 (1) of the Act of 1925 are satisfied, to continue pending proceedings, but it does not follow that section 1 of the Act of 1959 is retrospective in its operation or expressly applies to pending applications in the High Court made under section 51 (1) of the Act of 1925. These principles were correctly applied in the *Colonial Sugar* case [7] and in *In re a Debtor* (*No. 490 of 1935*),[8] and by the court below in the present case.

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[4] [1950] 1 K.B. 574, 579; 66 T.L.R. (Pt. 1) 195; [1950] 1 All E.R. 165, C.A.

[5] 9 Q.B.D. 672.

[6] [1950] 1 K.B. 574.

Statutes may be retrospective (a) if the legislation expressly applies to pending actions (*In re Joseph Suche & Co. Ltd.*[9]); (b) if by necessary intendment it applies to pending actions (*Hutchinson's* case [10]), and (c) if as a matter of construction the Act is retrospective in its operation. All the cases relied on by the Attorney-General fall under one of these three heads.

The Court of Appeal may take account of intervening legislation if, as a matter of construction, it applies to the proceedings in question, or if it is, on its true construction, retrospective. But the Act of 1959 does not expressly or by necessary implication apply to the present proceedings. An Act is not retrospective merely because it has an impact on a state of affairs existing at the date when it takes effect—in this case the respondent's pending actions. There must be far more than that to make it retrospective. An Act is retrospective if it nullifies or makes illegal or subjects to liability that which was valid, legal or free from liability when done before the Act. Section 26 of the Finance Act, 1950, is the classic instance of retrospective legislation. In a sense, too, the estate duty legislation is retrospective because it affects settlements created long before.

An Act is not to be construed retrospectively unless that is the clear intention of the legislature: *Quilter* v. *Mapleson.*[11] In that case the Act in question had a retrospective effect. That is not the case here. The respondent had the right of any citizen to litigate until that right was taken away by statute. When it was taken away, it was a future state which was modified or made illegal and not a past state. *Quilter's* case [11] is the high-water mark of the appellant's case. The respondent does not quarrel with it, but it is wholly different from the present case. In the Court of Appeal the appellant also relied on what Bankes L.J. said in *Stovin* v. *Fairbrass*,[12] but the explanation is to be found in what Scrutton L.J. said.[13] In *Hutchinson* v. *Jauncey*,[14] see what was said by Evershed M.R. and Cohen L.J.

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[7] [1905] A.C. 369.

[8] [1936] Ch. 237.

[9] (1875) 1 Ch.D. 48, 50.

[10] [1950] 1 K.B. 574.

[11] 9 Q.B.D. 672, 674.

Here section 51 (1) of the Act of 1925 is expressed in the words of futurity and is not retrospective, nor is the Act of 1959. This is made plain by section 1 (2) of the Act of 1959. If section 1 of that Act had the effect contended for by the appellant it would mean that if on the relevant date the Court of Appeal was about to give judgment in favour of the respondent it would be debarred from doing so on the ground of this section. That is so extreme as to border on the ludicrous. If the argument for the respondent is wrong so far, the Court of Appeal would have been right to make the order sought by the appellant.

But the Act of 1959 affected not only procedure but also substantive rights. As to the distinction between substantive rights and matters of procedure, see *Republic of Costa Rica* v. *Erlanger*.[15] Changes in the rules of procedure come into effect whenever they are made and have an immediate impact on the proceedings. But in the context of the present case the contrast is between the right to continue the proceedings in accordance with rules of procedure and the right to take any proceedings at all. In *In re a Debtor* (*No. 490 of 1935*) [16] Lord Wright M.R. distinguished *Quilter's* case,[17] though it is unfortunate that he used the expression "res judicata."

The Act of 1959 empowers the High Court to make an order affecting the respondent's right to continue litigation. It has never been suggested that the Divisional Court might not have made the order sought if the application had been made to it after May 14, 1959. The new Act affected the respondent's substantive right to continue proceedings commenced by him. An Act which impairs a substantive right is not one which the Court of Appeal can take into account, even though the court of first instance could have taken it into account, had it been in operation at the time of the hearing there: see *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[18]

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[12] (1919) 88 L.J.Q.B. 1004, 1010; 31 T.L.R. 659.

[13] 88 L.J.Q.B. 1004, 1013.

[14] [1950] 1 K.B. 574, 579, 584.

[15] (1876) 3 Ch.D. 62, 68–69, C.A.

[16] [1936] Ch. 237, 242–243.

[17] 9 Q.B.D. 672.

On the submission that the new Act takes away a substantive right and does not deal only with procedure, reliance is placed on *Colonial Sugar Refining Co. Ltd.* v. *Irving.*[19] To take away a person's right to institute proceedings is to destroy a substantive right. The same is true of taking away his right to continue proceedings which he has started. The right of a court to make an order for giving security for costs is a concomitant of its power to award costs. That is wholly procedural and is designed to enable the litigant in whose favour it is made to have the benefit of costs. That is quite different from the present case. An enactment that no action should be brought against any Minister of the Crown save by leave of the court would not be treated as merely a procedural regulation—it would be imposing a fetter on a pre-existing substantive right.

The Act of 1959 does not either expressly or by necessary implication apply to proceedings under appeal. It is not retrospective. The fact that its subject-matter is said to be pending actions by a vexatious litigant does not make it retrospective. The Court of Appeal was not entitled to take it into consideration because it dealt with substantive rights, the right of the subject to have access to the courts. No authority cited supports the appellant's arguments and *Colonial Sugar Refining Co. Ltd.* v. *Irving*[20] is against them. Section 27 (1) of the Act of 1925 cannot be construed as giving the Court of Appeal original jurisdiction in all cases.

Sir Reginald Manningham-Buller Q.C., A.-G., in reply. The Act of 1959 does not affect any of the respondent's rights. It only enlarges the powers given by the Act of 1925 on its being established that a person is a vexatious litigant. The Divisional Court held that the respondent was a vexatious litigant and made the only order which they could then make. Then the Act of 1959 came into operation. The appellant could have gone to the Divisional Court on May 15, not to get its decision altered, but to get the order made on that decision altered. After the respondent appealed the question arose whether the appellant should go back to the Divisional Court or raise the matter under the new Act on a cross-notice in the Court of Appeal. Having regard to Ord. 58, r. 3 (1), it was better to go to the Court of Appeal. That court, having found that the respondent was a vexatious litigant, had the power to deal with the matter under the Act of 1959. To make the addition to the order which the appellant seeks is a procedural matter. The right approach is that exemplified in *Quilter's* case.[21] If ever a case required a further order this is it. What Lord Wright said in the *New Brunswick* case [22] is in line with what the appellant submits.

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[18] [1939] A.C. 1, 24, 26, 28–29, 32; 55 T.L.R. 260; [1938] 4 All E.R. 747, H.L.

[19] [1905] A.C. 369.

[20] Ibid.

Their Lordships took time for consideration.

July 21. VISCOUNT SIMONDS. My Lords, on April 9, 1959, upon the application of Her Majesty's Attorney-General the High Court made an order that the respondent, Anthony Vernazza, should " be prohibited . . . from instituting proceedings in the " High Court or in any other court unless he obtains the leave of " the High Court or a judge thereof and satisfies the court or " judge that such legal proceeding is not an abuse of the process " of the court and that there is a prima facie ground for such " proceeding." Such an order could, under the terms of the statute authorising it (namely, section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925), be made only upon the footing that the court was satisfied that he had " habitually and persistently and without any reasonable ground " instituted vexatious legal proceedings." There could be no doubt that the order was amply justified.

On May 14, 1959, there came into operation an Act amending the 1925 Act, to which I have referred, by providing that after the words " in any court " in subsection (1) of section 51 there should be inserted the words " and that any legal proceedings " instituted by him in any court before the making of the order " shall not be continued by him without such leave " (section 1 (1) of the Supreme Court of Judicature (Amendment) Act, 1959). The single question for your Lordships' decision is whether in the circumstances that I shall now state it was competent for the Court of Appeal to vary the order of the High Court by adding an order that any legal proceedings instituted by the respondent in any court before the making of the order of April 9 should not be continued by him unless he obtained the leave of the court or a judge thereof and otherwise satisfied the condition of the statute.

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[21] 9 Q.B.D. 672.

[22] [1939] A.C. 1, 33.

On May 21, 1959, the respondent gave notice of appeal against the order of April 9, 1959. The Attorney-General, having obtained leave to that end, on October 29, 1959, served on the respondent a notice of contention whereby he gave notice that he would move to vary the order in the manner that I have indicated.

The appeal and notice of contention came before the Court of Appeal on December 2, 1959, and both were dismissed. No further question arises on the appeal, but the Attorney-General has by your Lordships' leave appealed from the dismissal of his notice.

It is conceded that the order for which the Attorney-General asked was proper to be made by the Court of Appeal if it was competent for that court to make it. I will therefore remind your Lordships of the relevant statutory provisions and Rules of the Supreme Court. They are as follows:—

Section 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides (so far as is material) as follows: "Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court. . . ."

Order 58 of the Rules of the Supreme Court provides (so far as is material) as follows:—

Rule 3 (1): "An appeal to the Court of Appeal shall be by way of re-hearing. . . ."

Rule 9 (3): "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

In these circumstances two questions seem to arise: (1) whether the High Court could itself now make an order in the terms prayed by the Attorney-General; (2) whether the Court of Appeal and therefore this House could make such an order. Upon the first point I am clearly of opinion that the High Court had the necessary power. If I correctly understood learned counsel for the respondent, the argument to the contrary was not seriously maintained. By the amending Act a new power was given to the court to enable it to deal with proceedings of which it was seised. The object was both to prevent an abuse of its process and to relieve possible victims of vexatious litigation. I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic in any degree, it is of a procedural nature and, as I think, amply covered by the authority of *Quilter* v. *Mapleson.*[1] The cases of *In re a Debtor* (*No. 490 of 1935*)[2] and *Colonial Sugar Refining Co. Ltd.* v. *Irving*[3] are distinguishable. I do not find the former case in all respects easy to understand, but in both cases the distinction is drawn between enactments which provide new remedies and those which affect substantive rights. An enactment which enables the court to deny to a vexatious litigant the power further to prosecute proceedings without leave appears to me to fall within the former category. It would, I think, be wrong to say that a man was deprived of a vested or substantive right, if it was still left open to him to prosecute any claim which was not an abuse of process and for which there was a prima facie case.

Upon the second question, which arises upon the assumption that the High Court could itself make the necessary order, it appears to me that the Court of Appeal, being entitled and bound to apply the law in force at the time of the appeal, was enabled, if it thought fit, to accede to the application of the Attorney-General. The concluding words of rule 9 (3) are wide. The power is " to make such further or other order as the case may " require." It would, I think, be too narrow a view to say that the case did not refer to all the existing facts and the law then applicable. I am therefore of opinion that the Court of Appeal could and should have varied the order of the High Court by adding thereto the order that any legal proceedings instituted by the respondent in any court before the making of that order " shall not be continued by him unless he obtains the leave of " the High Court or a judge thereof and satisfies the court or " judge that such legal proceeding is not an abuse of the process " of the court and that there is a prima facie ground for such " proceeding."

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[1] (1882) 9 Q.B.D. 672, C.A.

[2] [1936] Ch. 237; 52 T.L.R. 70, C.A.

[3] [1905] A.C. 369; 21 T.L.R. 513, P.C.

My noble and learned friend, LORD KEITH OF AVONHOLM, who is unable to be here today, asks me to say that he concurs in the opinion that I have given.

LORD REID. My Lords, I agree.

LORD DENNING. My Lords, Mr. Vernazza is a vexatious litigant. He so vexed others by his litigation that on February 19, 1959, the Attorney-General applied to the High Court for an order under the Act of 1925 to prohibit him *instituting* proceedings without the leave of the High Court, and on April 9, 1959, the High Court made an order as asked. At that date the High Court had no authority to prohibit him from *continuing* proceedings which he had already started. But on May 14, 1959, a new Act was passed which enabled the court not only to prohibit the *institution* of new proceedings without leave but also to prohibit the *continuance* of existing proceedings without leave. A week later, on May 21, 1959, Mr. Vernazza appealed to the Court of Appeal against the original order made against him. On December 2, 1959, his appeal was dismissed. So the order stands prohibiting him from *instituting* new proceedings. But the Attorney-General by a cross-notice sought from the Court of Appeal a further order under the new Act prohibiting him from *continuing* his existing proceedings. They refused to make this further order, considering they had no power to do so. The Attorney-General appeals to your Lordships' House against this refusal.

In order to determine this question, it is necessary, as Mr. Bagnall very properly observed, to distinguish between, on the one hand, the proceedings which Mr. Vernazza himself instituted against other litigants before the Attorney-General took action against him; and on the other hand, the proceedings which the Attorney-General has taken against Mr. Vernazza to have him condemned as a vexatious litigant.

Let me consider first the proceedings which Mr. Vernazza himself has already instituted against other litigants. If the effect of the new Act is to prevent him from continuing those proceedings to their ultimate conclusion, then it may be said to be a "retrospective" Act, at any rate in the sense in which Lord Blackburn once had occasion to use the word "retrospective." But whether this is a proper use of the word "retrospective" or not, it is of little moment, because the principles to be applied are not in doubt. If the new Act affects Mr. Vernazza's substantive rights, it will not be held to apply to proceedings which have already commenced, unless a clear intention to that effect is manifested, see *Colonial Sugar Refining Co. Ltd.* v. *Irving.*[3] But if the new Act affects matters of procedure only, then prima facie it applies to all actions, pending as well as future: for, as Lord Blackburn said: "Alterations in the form of procedure are "always retrospective, unless there is some good reason or other "why they should not be," see *Gardner* v. *Lucas.*[4]

The Court of Appeal seem to have thought that the new Act affects Mr. Vernazza's substantive right to carry on his pending proceedings: and that it ought not to be given a retrospective operation. I cannot, I am afraid, share this view. The new Act does not prevent Mr. Vernazza from continuing proceedings which it is proper for him to carry on. It only prevents him from continuing proceedings which are an abuse of the process of the court. If the proceedings are not an abuse and he has prima facie grounds for them, then he will be given leave to continue them. This is no interference with a substantive right. The courts of this country have an inherent power to "prevent the "abuse of legal machinery which would occur, if for no possible "benefit the defendants are to be dragged through litigation "which must be long and expensive," see *Willis* v. *Earl Beauchamp*[5] by Bowen L.J.: and when the courts of this country exercise this power, they are not depriving a man of a vested right. They are only exercising a control over their own procedure. No man, let alone a vexatious litigant, has a vested right to bring or continue proceedings which are an abuse of the process of the court.

Even if the new Act did affect substantive rights, however, I think there are clear words in this Act which show that Parliament intended it to be retrospective. The Act empowers the High Court to make an order "that any legal proceedings "instituted by him in any court *before the making of the order* "shall not be continued by him without such leave." That Act was passed on May 14, 1959. Suppose the court made an order on the next day, May 15, 1959, following the very words of the statute, as Parliament clearly contemplated that it might. That order would clearly prohibit the continuance of proceedings already begun before the Act. Else it would have no effect.

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[3] [1905] A.C. 369.

[4] (1878) 3 App.Cas. 582, 603, H.L.

[5] (1886) 11 P.D. 59, 63; 2 T.L.R. 270, C.A.

Just as during the war Acts were passed so as to enable penalties to be increased even after the offence was committed, so here this Act of 1959 was passed so as to prevent proceedings being continued which had already begun. To this extent the Act is retrospective. If the Attorney-General had made a fresh application to the High Court after May 14, 1959, he could undoubtedly have obtained an order prohibiting Mr. Vernazza from continuing his pending litigation without the leave of the court.

But what about the Court of Appeal? The new Act was passed after the judgment of the High Court and before the hearing in the Court of Appeal. Can the Court of Appeal take the new Act into account and make an order under it, or must it leave the Attorney-General to make a fresh application to the High Court?

It is, of course, clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings, see *In re A Debtor (No. 490 of 1935)*,[6] *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[7] But it is different when the statute is retrospective either because it contains clear words to that effect, or because it deals with matters of procedure only, for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance, see *Quilter* v. *Mapleson*[8] and *Stovin* v. *Fairbrass*.[9] Those decisions seem to me to show that the Court of Appeal can give effect to a retrospective Act passed in the interval since the case was at first instance, no matter whether it deals with vested rights or with procedure only, for, as Harman L.J. pointed out, the retrospective Act in *Quilter* v. *Mapleson*[10] affected the vested right of the landlord to recover possession. And the retrospective Act in *Stovin* v. *Fairbrass*[11] affected the vested right of the statutory tenant to remain in possession.

Applying this principle, the Act of 1959 was, as I have said, retrospective. So the Court of Appeal could give effect to it. And they should, I think, have done so. When Mr. Vernazza appealed to the Court of Appeal, seeking a finding that he was not a vexatious litigant, and asking that no order should be made against him, he thereby opened up the case for a rehearing, and by so doing, he let in the rule of court which authorises the Court of Appeal to make such order as the case may require. And the case required certainly this, that if he was found by the Court of Appeal to be a vexatious litigant, he should be prohibited then and there from continuing his pending litigation unless he obtained the leave of the court. It would be a work of supererogation to require the Attorney-General to go back to the High Court for an order when the Court of Appeal had seisin of the whole case and could make the order themselves.

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[6] [1936] Ch. 237.

[7] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747, H.L.

[8] 9 Q.B.D. 672.

[9] (1919) 88 L.J.K.B. 1004; 35 T.L.R. 659, C.A.

[10] 9 Q.B.D. 672.

[11] 88 L.J.K.B. 1004.

I would therefore allow the appeal. There should be added to the order of the Divisional Court a further order prohibiting Mr. Vernazza from continuing his pending litigation without leave.

LORD MORRIS OF BORTH-Y-GEST. My Lords, by a notice of motion dated February 19, 1959, the Attorney-General gave notice that he would apply to the Divisional Court of the Queen's Bench Division of the High Court of Justice for an order pursuant to section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by Mr. Vernazza in any court without the leave of the High Court or a judge thereof. The application was based upon the allegation that Mr. Vernazza had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. The application was heard on April 9, 1959. It was successful and an order was made as asked.

Mr. Vernazza had, however, some pending proceedings which he had already instituted. The order of the court did not affect those proceedings. The High Court was not then endowed with power to make an order which could affect such proceedings, even if there had been an application for any such order. The effect of section 51, as it then stood and as its wording showed, was that if the Attorney-General made application under the section, and if the High Court was satisfied that a person had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, then the High Court might, after hearing the person or giving him an opportunity of being heard, make an order that no legal proceedings should be instituted by such person without leave.

By the Supreme Court of Judicature (Amendment) Act, 1959, section 51 was amended and a new power was given. It was given to the High Court. It was a power to make an order that any legal proceedings instituted in any court before the making of the order should not be continued without leave. After May 14, 1959, the High Court could have been asked to make such an order against Mr. Vernazza. In view of their decision of April 9, 1959, there is no reason to think that if they had been asked they would not have made a further order against Mr. Vernazza.

In argument before your Lordships consideration was given to the question as to whether the amendment to section 51 which is effected by the Supreme Court of Judicature (Amendment) Act, 1959, is retrospective. The word "retrospective" in this connection is perhaps not wholly apt. By the amendment a new power is given to the High Court, which, after May 14, 1959, it could exercise. It was a power which it did not previously possess. In the exercise of it an order could be made which would operate upon "any legal proceedings instituted . . . before the "making of the order." The reference to "any legal proceed-"ings" instituted before the making of an order is in wide terms. The words cover any legal proceedings instituted at any time previous to the making of a restraining order. The words cover legal proceedings instituted before the passing of the Act of 1959.

From the order of the Divisional Court of April 9 Mr. Vernazza, on May 21, appealed to the Court of Appeal. He was entitled to appeal. His appeal, which was fully heard on December 2, failed. Previously, on October 29, 1959, a respondent's notice under Ord. 58, r. 6, had been served on behalf of the Attorney-General. Notice was given that, on the hearing of the appeal, it would be contended that the order of the Divisional Court should be varied by adding to it another order, namely, that any legal proceedings instituted by Mr. Vernazza before the making of the order of April 9 should not be continued by him without leave.

It is to be observed that the power which is given by section 51 is given to the High Court. The Court of Appeal has, generally speaking, no original jurisdiction, though by statute original jurisdiction could be conferred. A question arises, therefore, as to whether the Court of Appeal on the hearing of Mr. Vernazza's appeal could vary the order of the Divisional Court of the High Court by adding to it an order that any legal proceedings already instituted by Mr. Vernazza before April 9, 1959, should not be continued without leave. It can be said that the High Court have never directed their minds to the question as to whether any such order should be made. They were not previously asked to do so for the compelling reason that at the time of the hearing of the application to the High Court there was no power to make any such order. The following question is therefore raised. After Mr. Vernazza had appealed to the Court of Appeal against the order made against him, was the Attorney-General under obligation, if he desired to apply for the extended order made possible by the Act of 1959, to revert to the Divisional Court and there make a new application, or could he invite the Court of Appeal, if they upheld the order of the High Court, to vary it by adding to it in manner above-mentioned? On the facts of this case it would be unfortunate if the former course was necessitated and was the only permissible course, for it is expressly conceded that if the Court of Appeal had power to make the desired variation in the order of the Divisional Court, then upon the merits it would have been proper for them so to do.

The Court of Appeal has jurisdiction (see section 27 of the Supreme Court of Judicature (Consolidation) Act, 1925) to hear and determine appeals from any judgment or order of the High Court and " for all the purposes of and incidental to the hearing " and determination of any appeal, and the amendment, execu- " tion and enforcement of any judgment or order made thereon, " the Court of Appeal shall have all the power, authority and " jurisdiction of the High Court." It is provided by Ord. 58, r. 3 (1) of the Rules of the Supreme Court that an appeal to the Court of Appeal shall be by way of rehearing, and by rule 9 (3) it is provided that: " The Court of Appeal shall have power to " draw inferences of fact and to give any judgment and make any " order which ought to have been given or made and to make " such further or other order as the case may require."

The powers of the Court of Appeal were considered in the case of *Quilter* v. *Mapleson*.[12] The claim there made was for possession of premises under a proviso of re-entry for breaches of covenant. The plaintiff obtained judgment for possession but with a stay. The defendant appealed. Before the appeal came on for hearing the Conveyancing and Law of Property Act, 1881, came into operation. It had been passed after judgment was obtained. Under that Act it was provided that where a lessor was proceeding by action or otherwise to enforce a right of re-entry or forfeiture a lessee might in the lessor's action or in any action brought by himself apply to the High Court for relief, and that the High Court could grant relief upon such terms as in all the circumstances seemed proper. The provision was expressed to apply to leases made either before or after the commencement of the Act. It was held that as (because there was a stay) possession had not been obtained, the Court of Appeal could grant relief to the lessee upon terms. Jessel M.R. in his judgment [13] said: "On an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance." Bowen L.J., in his judgment,[14] said: "The only remaining question is, whether the Court of Appeal can give relief where a judgment had been obtained by the landlord before the Act came into operation. I think we should be misreading the Judicature rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of Appeal cannot decide according to the existing state of the law. I think that such is not the true construction of the rules, for Order 58, rule 5, does not merely enable the Court of Appeal to make any order which ought to have been made by the court below, but to make such further or other order as the case may require." Accordingly, in that case, as the plaintiff had not obtained the possession which he claimed, it was held in the Court of Appeal that justice required that, upon terms, relief from the delivery up of possession should be given.

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[12] 9 Q.B.D. 672.

The present case is not precisely analogous, for in *Quilter* v. *Mapleson* [15] the Court of Appeal took something away from a successful plaintiff whose case or whose claim was in no way altered. In the present case it can be said that a successful applicant is in the Court of Appeal asking to be given more than he previously had, and more than he had previously asked for. But the reasoning in *Quilter* v. *Mapleson* [15] is of assistance in determining the present case. Applying what was said by Jessel M.R., it has to be considered what order ought to have been made by the Divisional Court if the matter had come before them on December 2, 1959 (the date of the rehearing in the Court of Appeal). I entertain little doubt that the Divisional Court would, on that date if necessary, have allowed an amendment of the original application, and would have made an order in the extended terms that the law then authorised. The real substance of the matter before the Divisional Court would have been whether it was shown that Mr. Vernazza had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. If that were shown, then the extended procedural power of the court which was made available by the Act of 1959 as a remedial and protective measure against the prosecution of vexatious litigation would properly have been employed. The decision of the Divisional Court of April 9 as to the merits of the matter was upheld in the Court of Appeal. In your Lordships' House it is not in controversy that an order in extended form is, on the merits of the matter, amply warranted. I therefore conclude that the order which, in the Court of Appeal, "the case" required was that the order of April 9 should be varied in the manner desired.

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[13] 9 Q.B.D. 672, 676.

[14] Ibid. 678.

[15] 9 Q.B.D. 672.

Accordingly, I would allow the appeal.

Appeal allowed.

Solicitors: *Treasury Solicitor; Official Solicitor.*

F. C.

END OF VOLUME AND OF APPEAL CASES FOR 1960.

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